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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 757

ETHEL MEYER, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. 1]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,

against

ETHEL MEYER, individually, and as Executrix of the Estate of PETER MEYER, deceased, Defendant-Appellant.

STATEMENT UNDER RULE 15(b)

This is an appeal from summary judgment for the plaintiff in an action against the defendant* by the United States to recover income taxes assessed against her deceased husband.

The complaint in this action was filed on September 23, 1958, and a summons was thereupon issued. The summons and complaint were served on defendant on September 30, 1958. The answer was served and filed on November 18, 1958.

On October 26, 1961, plaintiff served and filed a motion for summary judgment against the defendant returnable [fol. 2] November 14, 1961, which was adjourned to December 12, 1961. The defendant served and filed an affidavit in opposition on December 6, 1961. After argument before Judge Palmieri and reserving of decision, the Court, on

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* Although the defendant was sued individually and as Executrix of her husband's estate, judgment was rendered against her only individually, apparently for the reason that the tax assessments were binding and enforceable against the estate of the deceased, without judgment.

January 12, 1962, rendered an opinion granting summary judgment in favor of plaintiff.

Judgment was signed by the Court on March 1, 1962, and was entered on March 2, 1962, in favor of plaintiff and against the defendant for the sum of $6,159.09 together with interest thereon amounting to $5,712.40, and $40.20 costs and disbursements, amounting in all to the sum of $11,911.69. A notice of appeal by defendant to this Court, from said judgment, was filed on March 14, 1962.

[fol. 3]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action File Number 138-73

SUMMONS—September 23, 1958

To the Above-Named Defendant:

You are hereby summoned and required to serve upon Arthur H. Christy, United States Attorney for the Southern District of New York, plaintiff's attorney, whose address is United States Court House, Foley Square, New York 7, New York, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Herbert A. Charlson, Clerk of Court, Eugene Liehr, Deputy Clerk.

(This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure)

[fol. 4]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 138-73

COMPLAINT—Filed September 23, 1958

Comes now the plaintiff, the United States of America, by its attorney, Arthur H. Christy, United States Attorney in and for the Southern District of New York, and for claim against the defendant, Ethel Meyer, individually and as executrix of the estate of Peter Meyer, deceased, complains and alleges as follows:

I

This action is authorized and requested by the Commissioner of Internal Revenue, a delegate of the Secretary of the Treasury, and is brought under the direction of the Attorney General of the United States.

II

Jurisdiction is conferred upon this Court by Sections 1340 and 1345 of Title 28, United States Code, for the reason that this is a civil action arising under the Internal Revenue Laws of the United States and is brought by the United States as a party plaintiff.

[fol. 5]

III

The defendant, Ethel Meyer, resides at 277 West End Avenue, New York, New York, within the jurisdiction of this Court.

IV

On May 22, 1946, the then Commissioner of Internal Revenue made an assessment of taxes upon the income of one Peter Meyer, the now deceased husband of the defendant, Ethel Meyer, for the calendar year 1945 in the amount of $5,633.25, of which $1,408.18 was paid on

April 1, 1946, and $1,408.08 was paid on August 1, 1946. Said Commissioner certified a list of said assessment to the then Collector of Internal Revenue for the Collection District of New York by whom it was received on May 27, 1946 and by whom notice of the assessment was given to and demand for payment of the amount thereof was made on June 6, 1946, upon Peter Meyer. Peter Meyer failed and neglected to pay in full the amount assessed, whereupon the said Collector on July 11, 1955, filed a notice with the Register's Office, Hall of Records, New York County, New York, wherein a lien is claimed on behalf of the plaintiff upon all property and rights to property, real and personal, of Peter Meyer in the amount of $2,816.99 plus interest that may accrue in addition to the tax assessed. The facts alleged in this and paragraphs V, VI, and VII, are set forth in abbreviated form in "Exhibit A" which is attached hereto and expressly made a part hereof.

V

On June 17, 1947, the then Commissioner of Internal Revenue made an assessment of taxes upon the income [fol. 6] of one Peter Meyer, the now deceased husband of the defendant, Ethel Meyer, for the calendar year 1946 in the amount of $3,342.10. Said Commissioner certified a list of said assessment to the then Collector of Internal Revenue for the Collection District of New York by whom it was received on June 18, 1947, and by whom notice thereof was given to and demand for payment of the amount thereof was made on June 18, 1947, upon Peter Meyer. Peter Meyer failed and neglected to pay any part of the amount assessed, whereupon the said Collector on July 11, 1955, filed a notice with the Register's Office, Hall of Records, New York County, New York, wherein a lien is claimed on behalf of the plaintiff upon all property and rights to property, real and personal, of Peter Meyer in the amount of $3,342.10 plus interest that may accrue in addition to the tax assessed.

VI

On May 10, 1951, Peter Meyer executed Tax Collection Waivers (Form 900) extending the time for the collection of his income tax, assessed as aforesaid, for the calendar year 1945 by distraint or by a proceeding in court to December 31, 1956, and extending the time for the collection of his income tax, assessed as aforesaid, for the calendar year 1946 by distraint or by a proceeding in court to December 31, 1957.

VII

On August 3, 1955, Peter Meyer submitted an Offer in Compromise (Form 656-C) with reference to the hereinbefore mentioned assessments of income taxes for the calendar years 1945 and 1946, which Offer in Compromise [fol. 7] was rejected on May 28, 1956, thus extending the period for collection of the 1945 taxes to September 25, 1958, and to September 25, 1959, for the 1946 taxes.

VIII

The outstanding balance of the aforementioned assessments in the total sum of $6,159.09 plus interest that may accrue in addition thereto is now outstanding, unpaid, due, and owing.

IX

Plaintiff alleges upon information and belief that Peter Meyer, a resident of New York, died on December 28, 1955, and that the defendant, Ethel Meyer, his widow, was appointed executrix of his estate and is still acting as such.

X

During his lifetime, Peter Meyer was insured under several life insurance policies issued to him by the Equitable Life Assurance Society of the United States and the New York Life Insurance Company, which policies are set out as follows:

	Policy Number	Amount of Policy	Cash Value*
Equitable Life Assurance Society of the United States 393 Seventh Avenue New York, New York	7,857,676	$20,000.00	$10,455.87
New York Life Insurance Company 51 Madison Avenue New York, New York	8,804,034	15,000.00	8,415.00
	8,804,035	10,000.00	5,610.00
	8,804,036	5,000.00	2,805.00

* The cash value is the cash surrender value at the date of the decedent's death.

[fol. 8]

XI

With respect to each of the policies set forth in paragraph X above, Peter Meyer retained the right to change the beneficiary and the incidents of ownership thereof and possessed the right to demand the cash surrender value from the insurer.

XII

The defendant, Ethel Meyer, was on the date of Peter Meyer's death the beneficiary under each of the policies of life insurance set forth in paragraph X above.

XIII

Upon the death of Peter Meyer, the hereinabove named insurance companies paid out $50,664.27 as the value as of the date of payment of the hereinbefore mentioned policies of life insurance issued by them.

XIV

On the date payment was made by the hereinabove named insurance companies, and prior to the death of Peter Meyer, there was a Notice of Federal Tax Lien on file with the Register, City of New York, Hall of Records, New York, New York, upon all property and rights to property belonging to the taxpayer, Peter Meyer, now deceased.

XV

Of the total amount paid out as aforesaid by the hereinabove named insurance companies, the defendant, Ethel Meyer, received $23,674.27.

[fol. 9]

XVI

The $23,674.27 received as aforesaid by the defendant, Ethel Meyer, represents a portion of the total cash surrender value of the hereinabove mentioned policies of life insurance and is an amount in excess of the hereinbefore mentioned tax obligations of Peter Meyer, deceased.

Wherefore, plaintiff prays:

1. That the Court adjudge and decree that Peter Meyer was, and the estate of Peter Meyer is, indebted to the plaintiff in the amount of $6,159.09 plus interest until paid as provided by law.

2. That the Court adjudge and decree that the defendant, Ethel Meyer, received, as the cash surrender value of policies of insurance on the life of Peter Meyer, deceased, property in the amount of $26,674.27, an amount in excess of the herein involved tax obligations of Peter Meyer, deceased.

3. That the Court adjudge and decree that plaintiff has a valid and existing lien on the property received by the defendant, Ethel Meyer, as the cash surrender value of the policies of insurance on the life of Peter Meyer, deceased, to the extent of the herein involved tax liabilities of the said Peter Meyer, deceased.,

4. That the Court adjudge and decree that the lien of the plaintiff be foreclosed against the property received by the defendant, Ethel Meyer, as the cash surrender value of policies of life insurance upon the life of Peter Meyer, deceased, and that a sufficient amount thereof be [fol. 10] applied to make payment in full of the sum of $6,159.09 plus interest until paid as provided by law and, if the defendant, Ethel Meyer, no longer retains such cash surrender value, that the plaintiff have and recover judg-

ment against the defendant, Ethel Meyer, in the amount of $6,159.09 plus interest until paid as provided by law, which judgment and interest shall in no event exceed the amount of the cash surrender value received by the defendant, Ethel Meyer.

5. That the plaintiff have such other and further relief as the Court may deem proper in the premises.

Dated: New York, N. Y., September 22, 1958.

Arthur H. Christy, United States Attorney, By: James McK. Rose, Jr., Assistant United States Attorney, Office and Post Office Address: United States Court House, Foley Square, New York 7, N. Y.

[fol. 11]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

EXHIBIT A TO COMPLAINT

	Calendar Year 1945	*Calendar Year 1946*
Type of Tax	Income	Income
Date of Assessment	5-22-46	6-17-47
Amount Assessed	$5,633.25—tax	$3,342.00–tax
Payments and Date Payments Made	$1,408.18—4-1-46 $1,408.08—8-1-46	——
Balance	$2,816.99	$3,342.10
Assessment List Received by Collector	5-27-46	6-18-47
Date of Notice and Demand	6- 6-46	6-26-47
Date Notice of Lien Filed	7-11-55	7-11-55
Tax Collection Waiver Executed	5-10-51	5-10-51
Date Waiver Expires	12-31-56	12-31-57
Offer In Compromise Submitted	8- 3-55	8- 3-55
Offer in Compromise Rejected	5-28-56	5-28-56

[fol. 12]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 138-73

ANSWER—Filed November 18, 1958

Defendant, Ethel Meyer, individually and as executrix of the Estate of Peter Meyer, Deceased, answering the complaint by Gettinger & Gettinger, her attorneys:

1. Denies any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in paragraphs of the complaint numbered "I", "V", "VI", "VII", "VIII", and "XIV".

2. Denies any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in paragraph of the complaint numbered "IV" except, upon information and belief, that payments were made by the deceased, as alleged.

3. Denies each and every allegation contained in paragraph of the complaint numbered "XVI" except that from the said sum of $23,674.27 received by defendant, Ethel Meyer; she received the sum of only $441.21 of the cash surrender value, viz: that the total cash surrender value of the aforementioned policies set forth in the complaint amounted to the sum of $27,285.87 and that the bank loans on the said policies at the time of the death of the deceased totalled $26,844.66 which, when subtracted from the aforementioned sum of $27,285.87, left the balance of the cash surrender value of $441.21 received by defendant, Ethel Meyer, which said sum of $441.21 the said defendant hereby offers to pay to the plaintiff in full satisfaction [fol. 13] of any and all obligations insofar as the said defendant is individually concerned.

For a First Separate Distinct and Affirmative Defense

4. That at all the times herein stated, defendant, Ethel Meyer, was the wife of Peter Meyer, the deceased.

5. That during his lifetime the said Peter Meyer was insured under several life insurance policies issued to him by the Equitable Life Assurance Society of the United States and the New York Life Insurance Company, which policies totalled the sum of $50,000., under which policies the said insured designated his wife, the defendant, Ethel Meyer, as the sole beneficiary therein.

6. That during his lifetime said Peter Meyer borrowed sums of money from a bank and, as security for the repayment thereof, assigned all of the said policies as collateral security to the bank and pledged same to the bank for the repayment of the said loans, which loans were outstanding and unpaid at the time of his death and amounted to the sum of $26,844.66.

7. That the cash surrender value of the said policies at the time of the death of the said Peter Meyer amounted to the sum of $27,285.87.

8. That the amount of the outstanding loans due to the bank under the said policies of the deceased at the time of his death amounted to the sum of $26,844.66 which was $441.21 less than the cash surrender value under said policies.

9. That the lien for taxes, if any, of the plaintiff could only attach to the cash surrender value of the said policies [fol. 14] assuming there were no outstanding loans and there were no assignments made or pledges made under the loans herein, and that the said liens, if any, asserted herein could not and cannot affect the proceeds under the said policies over and above the cash surrender value, to which the defendant, Ethel Meyer, as beneficiary, became entitled to receive and did receive upon the death of her husband, Peter Meyer.

10. That the net proceeds that the defendant, Ethel Meyer, individually received under the said policies wherein she was named as beneficiary (with the exception of the sum of $441.21) were property rights in the said policies which belonged solely to the plaintiff, individually, as beneficiary named under said policies and had no prior existence

and only arose by reason of the death of the insured, Peter Meyer, and became her property solely by reason of and at the time of the death of said insured, and that, therefore, the lien, if any, of the plaintiff did not arise and could not attach to the said proceeds so received by the defendant, Ethel Meyer, with the exception of the said sum of $441.21, aforesaid, which said sum of $441.21 defendant, Ethel Meyer, offers to pay to the plaintiff in full satisfaction of the claim against her, individually, herein.

Wherefore, defendant, Ethel Meyer, individually, and as executrix of the Estate of Peter Meyer, deceased, demands judgment dismissing the complaint with costs.

Gettinger & Gettinger, By Martin A. Gettinger, Member of Firm.

[fol. 15]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. No. 138-73

NOTICE OF MOTION FOR SUMMARY JUDGMENT—
Filed October 26, 1961

Sir:

Please take notice, that upon the pleadings herein and upon annexed affidavit of Eugene R. Anderson, sworn to the 25th day of October 1961, the undersigned will move this Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, at a motion part thereof, in Room 506, United States Courthouse, Foley Square, New York 7, New York, on the 14th day of November 1961, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order granting summary judgment and for such other and further relief as to this Court may seem just and proper.

Dated: New York, New York, October 25, 1961.

Yours, etc.,

Robert M. Morgenthau, United States Attorney for the Southern District of New York, Attorney for Plaintiff, United States of America, Office and Post Office Address: United States Court House, Foley Square, New York 7, New York.

To: R. Gettinger and M. Gettinger, Esqs., Attorneys for Defendant, 1407 Broadway, New York, New York.

[fol. 16]

Civ. No. 138-73

AFFIDAVIT OF EUGENE R. ANDERSON, READ IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

State of New York
County of New York
Southern District of New York—ss.:

Eugene R. Anderson, being duly sworn, deposes and says:

1. He is an Assistant United States Attorney in the office of Robert M. Morgenthau, United States Attorney for the Southern District of New York, and as such is in charge of and familiar with the above-captioned action.

2. This affidavit is made in support of plaintiff's motion for summary judgment.

3. The facts stated in the annexed "Statement of Material Facts as to Which the Plaintiff Contends There is no Genuine Issue to be Tried" appear from the pleadings herein and from the files of the plaintiff and, upon information and belief, are true.

4. There is no genuine issue as to any material fact.

Wherefore, it is respectfully requested that plaintiff's motion for summary judgment be granted.

Eugene R. Anderson, Assistant United States Attorney.

(Sworn to by Eugene R. Anderson, October 25, 1961.)

[fol. 17]

Civ. No. 138-73

STATEMENT OF MATERIAL FACTS AS TO WHICH THE PLAINTIFF CONTENDS THERE IS NO GENUINE ISSUE TO BE TRIED

1. This action is authorized and requested by the Commissioner of Internal Revenue, a delegate of the Secretary of the Treasury, and is brought under the direction of the Attorney General of the United States.

2. Jurisdiction is conferred upon this Court by Sections 1340 and 1345 of Title 28, United States Code, for the reason that this is an action arising under the Internal Revenue Laws of the United States and is brought by the United States as a party plaintiff.

3. This action was commenced by the filing of the complaint on September 23, 1958.

4. Defendant, Ethel Meyer, resides at 277 West End Avenue, New York, New York, within the jurisdiction of this Court.

5. Defendant, Ethel Meyer, was personally served with the summons and complaint in this action on September 30, 1958.

6. Defendant, Ethel Meyer, appeared by her attorneys, Gettinger & Gettinger, Esqs., and filed an answer on November 18, 1958.

[fol. 18] 7. On May 22, 1946, the Commissioner of Internal Revenue made an assessment upon the income of one Peter Meyer, the now deceased husband of the defendant, Ethel Meyer, for the calendar year 1945, in the amount of $5633.25, of which $1408.18 was paid on April 1, 1946 and $1408.08 was paid on August 1, 1946; that no other payments were received with respect to the aforesaid as-

sessment; that the balance of $2816.99, plus interest, is still due and owing to the United States of America and remains unpaid.

8. Notice of the aforesaid assessment was given to and demand for payment of the amount thereof was made on June 6, 1946, upon said Peter Meyer.

9. On June 17, 1947, the Commissioner of Internal Revenue made an assessment of taxes upon the income of the said Peter Meyer, for the calendar year 1946, in the amount of $3342.10.

10. Notice of this assessment was given to and demand for payment of the amount thereof was made on June 18, 1947, upon the said Peter Meyer. No part of this assessment was paid and there still remains due and owing to the United States of America the amount of $3342.10 plus interest.

11. As a result of the foregoing assessments, there still remains due and owing to the United States of America, the total sum of $6159.09, plus interest, until paid, as provided by law.

12. On July 11, 1955 the District Director of Internal Revenue filed a notice with the Register's Office, Hall of Records, New York County, New York, New York, wherein a lien is claimed on behalf of the plaintiff upon all property and rights to property, real and personal, of the said [fol. 19] Peter Meyer, in the total amount of $6159.09, plus interest, according to law.

13. The taxpayer, Peter Meyer, a resident of New York, died on December 28, 1955 and defendant, Ethel Meyer, is the executrix of his estate.

14. During his lifetime, Peter Meyer was insured under several life insurance policies issued to him by the Equitable Life Assurance Society of the United States and the New York Life Insurance Company, which policies are set out as follows:

	Policy Number	*Amount of Policy*	*Cash Value**
Equitable Life Assurance Society of the United States 293 Seventh Avenue New York, New York	7,857,676	$20,000.00	$10,455.87
New York Life Insurance Company 51 Madison Avenue New York, New York	8,804,034	15,000.00	8,415.00
	8,804,035	10,000.00	5,610.00
	8,804,036	5,000.00	2,805.00
Total		$50,000.00	$27,285.87

* The cash value is the cash surrender value at the date of the decedent's death.

15. With respect to each of the policies set forth above, Peter Meyer retained the right to change the beneficiary and the incidents of ownership thereof and possessed the right to demand the cash surrender value from the insurer.

16. The defendant, Ethel Meyer, widow of Peter Meyer, was on the date of Peter Meyer's death, the beneficiary under each of the policies of life insurance set forth above.

[fol. 20] 17. Upon the death of Peter Meyer, the above named insurance companies paid $50,664.27 to the defendant, Ethel Meyer, as the proceeds of the above mentioned policies of life insurance issued by them.

18. During his lifetime, the said Peter Meyer borrowed sums of money from the Huntington National Bank of Columbus, Ohio, and on June 29, 1943 assigned and pledged all of the said policies as collateral security to the bank for the repayment of the loans, which loans were outstanding and unpaid at the time of his death in the amount of $26,844.66.

19. Under the terms of the assignment or pledge the bank was given the right to satisfy its claim out of the "net proceeds of the policy when it becomes a claim by death".

20. Upon the death of Peter Meyer the defendant, Ethel Meyer, paid the amount due to the bank to discharge the pledges.

21. In summary:

Amount of Policies	$50,000.00
Amount of Proceeds paid to defendant	50,664.27
Cash Surrender Value on date of death	27,285.87
Amount paid by defendant to discharge pledges	26,844.66
Unpaid Income taxes due from decedent, Peter Meyer	6,159.09*

* Plus interest.

[fol. 21]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. No. 138-73

AFFIDAVIT OF MARTIN A. GETTINGER, READ IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT—Filed December 6, 1961

State of New York
County of New York
Southern District of New York—ss.:

Martin A. Gettinger, being duly sworn, deposes and says:

1. That I am a member of the law firm of R. Gettinger & M. Gettinger, attorneys for the defendant herein and am fully familiar with all the facts and proceedings heretofore had herein.

2. This affidavit is made in opposition to plaintiff's motion for summary judgment.

3. The defendant's statement of facts, which controverts plaintiff's statement of facts, is annexed to the within affidavit. Defendant admits the facts annexed to plaintiff's affidavit, except as controverted by the annexed statement of facts.

[fol. 22] 4. The plaintiff's moving affidavit stated nothing concerning any question of law which is involved in this case. However, there are important questions of law, as well as questions of fact, in this case which warrant the denial of plaintiff's motion for summary judgment.

5. One of the questions of law herein is as follows: Is the plaintiff entitled to judgment against the insured's widow, the defendant herein, and who is the beneficiary of the policies of the deceased? That question is resolved by whether the defendant received the cash surrender value of the policies herein. Defendant concedes that, insofar as the cash surrender value of the policies herein, she received only the sum of $441.21 with respect thereto, which sum the defendant has, at all times, tendered to plaintiff and has been ready to pay and now, again, offers to pay. Insofar as the sum actually received* by the life insurance companies to the Huntington National Bank of Columbus, Ohio, defendant did not receive any part of the cash surrender value of the policies, except for the said sum of $441.21. It is also important in this case to note the fact that, with respect to said cash surrender value, the insured made an assignment and pledge of all the policies herein on June 29, 1943 to the Huntington National Bank of Columbus, Ohio, which date preceded the dates that the plaintiff obtained the liens herein by the making of assessments on May 22, 1946 and on June 17, 1947. The cash surrender value of the policies (except for the said sum of $441.21), having been assigned and pledged by the insured prior to the obtaining of the liens by the plaintiff, the plaintiff as a matter of law, is not entitled to collect [fol. 23] any sum over and above said cash surrender value, except the sum of $441.21, from the defendant by reason of the fact that any sum received by her is exempt under Section 166 of The Insurance Law of the State of New York and does not constitute "property and rights to property" under Section 6321 of Title 26 of the Internal Revenue Code. It is respectfully submitted that the foregoing is the law applicable to this case, respecting which an opposing memorandum of law is submitted.

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* "received" should be "paid".

Wherefore, deponent respectfully requests that the plaintiff's motion for summary judgment be denied.

Martin A. Gettinger

(Sworn to by Martin A. Gettinger, December 4, 1961.)

[fol. 24]

Civ. No. 138-73

DEFENDANT'S STATEMENT OF MATERIAL FACTS AS TO WHICH IT IS CONTENDED THAT THERE EXISTS GENUINE ISSUES TO BE TRIED

1. That from on and after June 29, 1943, Peter Meyer, the insured (deceased) retained the right to change the beneficiary of the policies, subject to the assignment made on the aforementioned date, to the Huntington National Bank of Columbus, Ohio; that said Peter Meyer did not retain, by reason of the said assignment made on June 29, 1943 of the policies herein, the incidence of ownership thereof nor did he possess the right to demand the cash surrender from the insurers. (This statement controverts paragraph 15 of the plaintiff's statement of facts.)

2. Upon the death of Peter Meyer, the insurance companies paid the sum of $50,664.27 as follows:

The sum of $26,844.66 was paid to the Huntington National Bank of Columbus, Ohio, and the difference between the said sum of $50,664.27 and the said sum of $26,844.66 (paid to Huntington National Bank) was paid or received by Ethel Meyer, the beneficiary herein. The cash surrender [fol. 25] value of all the policies (less the sum of $441.21) was received by the Huntington National Bank of Columbus, Ohio, to whom all the said policies were assigned and pledged as security for the loan of June 29, 1943. (This statement controverts paragraph 17 of the plaintiff's statement of facts.)

3. With respect to paragraphs 20 and 21 of plaintiff's statement of facts, the same is correct except as denied by paragraph numbered 2 supra and except that the defendant denies that she paid the amount due to the Bank to discharge the pledges and alleges that the amount paid

to the Huntington National Bank of Columbus, Ohio, to discharge the assignments and pledges of the life insurance policies was paid by the life insurance companies.

[fol. 26]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

OPINION—January 12, 1962

The United States has moved for summary judgment in an action by it against Ethel Meyer, individually and as executrix of her husband's estate, for $6,159.09, plus interest. This amount is due on taxes assessed against Peter Meyer for the years 1945 and 1946. Notice of the tax assessments was given and demand made in 1946 and 1947 respectively, thereby giving rise to a "lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to" the decedent. 26 U. S. C. §6321.

The Government seeks to recover the money owed it out of insurance proceeds received by Ethel Meyer as the beneficiary of several policies on the life of Peter Meyer. The policies had a face value of $50,000 and a cash surrender value of $27,285.87. The policies permitted decedent to change the beneficiary and to demand the cash surrender value. In 1943, prior to the tax assessments, the insured had pledged and assigned the policies to the Huntington National Bank of Columbus, Ohio, as security for a loan of $26,844.66. Under the terms of the assignment, the bank was given the right to satisfy its claim out of the net proceeds of the policy when it became a claim by death. Upon the death of Peter Meyer the bank was paid $26,844.66 and the remainder of the proceeds were paid to Ethel Meyer.

In *United States* v. *Bess*, 357 U. S. 51 (1958), the Supreme Court held that if the cash surrender value of a life insurance policy is property under the applicable state law it is property under 26 U. S. C. §6321, and a federal tax lien attaches to it and continues to exist after the tax-
[fol. 27] payer's death. The defendant does not contest her deceased husband's tax liability nor does she dispute

that a federal tax lien may attach to the cash surrender value of life insurance policies. She contends, however, that the debt to the bank was paid out of the cash surrender value, leaving the difference between the cash surrender value of the policy and the amount paid to the bank, $441.21, for enforcement of the Government's lien. This contention is directly contrary to this Circuit's holding in *United States* v. *Behrens*, 230 F. 2d 504 (2d Cir. 1956).

The defendant in *Behrens* was the beneficiary of a number of insurance policies on the life of her husband which had a cash surrender value of $22,000 and a face value of $59,000. The policies had been pledged to a bank for a loan of $17,000 which defendant was obliged to pay. Judge Learned Hand denied her contention that she was entitled to deduct this amount from the cash surrender value and permitted plaintiff to enforce its tax lien against the full amount of the cash surrender value, saying:

> "The tax lien • • • did not indeed have priority over the pledge; but the 'proceeds' were large enough to pay both claims, and it is well settled law that, when one creditor has a claim against two funds as security and another creditor has a claim against only one of them, the loan of the first will be marshalled against that fund which is security for his loan only" (p. 507).

[fol. 28] Applying this rule to the instant case, it follows that the Government is entitled to enforce its tax lien against the full amount of the cash surrender value notwithstanding payment to the bank of the loan for which the policies were assigned and pledged.

Plaintiff's motion for summary judgment is granted. Submit order on notice.

Dated: New York, N. Y., January 12, 1962.

Edmund L. Palmieri, U. S. D. J.

[fol. 29] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil No. 138-73

JUDGMENT—Entered March 2, 1962

Plaintiff, United States of America, having moved for summary judgment and the cause having been duly heard, and this Court by the Honorable Edmund L. Palmieri having rendered its memorandum opinion on January 12, 1962, it is

Ordered that the plaintiff's motion for summary judgment be and the same hereby is granted and it is further

Ordered and adjudged, that the plaintiff, United States of America, have judgment against the defendant, Ethel Meyer, for the sum of $6,159.09, together with interest thereon amounting to $5,712.40, and together with costs and disbursements in the sum of $40.20, amounting in all to the sum of $11,911.69 and that the plaintiff have execution therefor.

Dated: New York, New York, March 1, 1962.

Edmund Palmieri, U. S. D. J.

[fol. 30]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil No. 138-73

NOTICE OF APPEAL—Filed March 14, 1962

Sir:

Please take notice that Ethel Meyer, the defendant above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the judgment dated March 1, 1962, made by Hon. Edmund L. Palmieri, United States District Judge, granting judgment to the plaintiff, United States of America, against the defendant, Ethel Meyer, for the sum of $6,159.09, together with interest of $5,712.40 and with costs and disbursements of $40.20, amounting in all to the sum of $11,911.69, which judgment was entered on March 2, 1962, and that the defendant appeals from each and every part of said judgment, as well as from the whole thereof.

Dated: New York, New York, March 14, 1962.

Yours, etc.

R. Gettinger & M. Gettinger, Attorneys for Defendant, By Martin A. Gettinger, Member of Firm, Office & P. O. Address, 1407 Broadway, New York 18, New York.

[fol. 31] To:

Robert M. Morgenthau, Esq., United States Attorney, Attorney for Plaintiff, United States Courthouse, Foley Square, New York 7, New York.

Clerk, United States District Court, Southern District of New York.

[fol. 32] [File endorsement omitted]

Appendix to Brief for the United States of America —Filed September 11, 1962

[fol. 33]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. No. 138-73

UNITED STATES OF AMERICA, Plaintiff,

—v.—

ETHEL MEYER, individually and as Executrix of the Estate of PETER MEYER, deceased, Defendant.

AMENDED JUDGMENT—Entered June 5, 1962

A judgment, No. 65,186, having been entered in the above matter on March 2, 1962 against the defendant individually but not as executrix of the estate of Peter Meyer, deceased, and defendant having appealed from said judgment to the United States Court of Appeals for the Second Circuit and the plaintiff having moved before the said Court of Appeals for an order remanding the action to this Court for the purpose of moving before this Court to amend the judgment and said motion having been granted by the said Court of Appeals and a motion having been made by the plaintiff before this Court pursuant to the mandate of said Court of Appeals to amend the judgment and no one having appeared in opposition thereto, now therefore, it is

[fol. 34] Ordered and adjudged that judgment 65,186 heretofore entered on March 2, 1962 is amended *nunc pro tunc* to read as follows:

Plaintiff, United States of America, having moved for summary judgment and the cause having been duly

heard, and this Court by the Honorable Edmund L. Palmieri having rendered its memorandum opinion on January 12, 1962, it is

Ordered that the plaintiff's motion for summary judgment be and the same hereby is granted and it is further

Ordered and adjudged, that the plaintiff, United States of America, have judgment against the defendant, Ethel Meyer, individually and as Executrix of the Estate of Peter Meyer, deceased, for the sum of $6,159.09, together with interest thereon amounting to $5,712.40, and together with costs and disbursements in the sum of $40.20, amounting in all to the sum of $11,911.69 and that the plaintiff have execution therefor.

Dated: New York, New York, June 4, 1962.

Edmund L. Palmieri, U.S.D.J.

Recd. in Clerk's Office 6/5/62

[File endorsement omitted]

[fol. 35]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 19—October Term, 1962

Argued October 15, 1962

Docket No. 27477

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

ETHEL MEYER, individually, and as Executrix of the Estate of Peter Meyer, Deceased, Defendant-Appellant.

OPINION—October 24, 1962

Before:

Waterman, Hays and Marshall, Circuit Judges.

Appeal from a summary judgment of the District Court for the Southern District of New York, Edmund Palmieri, Judge, in favor of the Government in an action to recover income taxes assessed against defendant's deceased husband under 26 U. S. C. §§6321, 6322.

Affirmed.

Eugene R. Anderson, Assistant United States Attorney, New York City (Vincent L. Broderick, United States Attorney for the Southern District of New York, Robert Arum, Assistant United States Attorney, New York City, on the brief), for plaintiff-appellee.

[fol. 36] Samuel W. Sherman of R. Gettinger & M. Gettinger, New York City, for defendant-appellant.

PER CURIAM:

The decedent pledged life insurance policies to a bank as collateral security for a loan. Thereafter he was assessed certain deficiencies in payment of income tax. At the time of his death both the loan and the assessments remained unpaid. Payment of the loan exhausted the cash surrender value of the policies except for an amount too small to pay the deficiency assessments. The Government seeks to recover the tax liabilities from the proceeds of the insurance policies.

As the District Court held, 202 F. Supp. 606, this case is controlled by *United States* v. *Behrens*, 230 F. 2d 504 (2d Cir. 1956), *cert. denied*, 351 U. S. 919, which held that

> "when one creditor has a claim against two funds as security and another creditor has a claim against only one of them, the loan of the first will be marshalled against that fund which is security for his loan only." (p. 507).

Appellant attempts to distinguish the *Behrens* case on the ground that in that case the government's assessment was made prior to the taxpayer's pledge of the policies, whereas here the pledge preceded the assessment. Appellant argues that the lien could attach only to the excess of the surrender value over the amount of the loan. But in *Behrens*, the "tax lien, not having been filed, did not indeed have priority over the pledge" (p. 507). In the present case by reason of the prior pledge of the policies to the bank the government's tax lien was secondary, but it was not nugatory, and the proceeds passed to appellant subject [fol. 37] to both claims at the taxpayer's death. Whatever the value of the tax lien during the taxpayer's lifetime, it could be fully satisfied out of that portion of the proceeds representing the former cash surrender value by marshalling the bank's prior claim against the balance of the proceeds at his death.

Judgment affirmed.

[fol. 38]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. Sterry R. Waterman, Hon. Paul R. Hays, Hon. Thurgood Marshall, Circuit Judges.

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

ETHEL MEYER, individually and as Executrix of the Estate of Peter Meyer, deceased, Defendant-Appellant.

JUDGMENT—October 24, 1962

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro, Clerk.

[fol. 39] [File endorsement omitted]

[fol. 40] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 41]

SUPREME COURT OF THE UNITED STATES

No. 757, October Term, 1962

ETHEL MEYER, Petitioner,

vs.

UNITED STATES.

ORDER ALLOWING CERTIORARI—March 4, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office-Supreme Court, U.S.
FILED
JAN 18 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1962

No. [redacted] 61

ETHEL MEYER,

Petitioner.

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. .....

ETHEL MEYER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Ethel Meyer, respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to review the judgment of that Court entered in this case on October 24, 1962, only insofar as petitioner, individually, is concerned, which affirmed a judgment of the United States District Court for the Southern District of New York in respondent's favor and against petitioner individually and as executrix of the estate of Peter Meyer, deceased, for the sum of $11,911.69, based upon a motion for summary judgment (R. 33a-34a, 38a).

The United States District Court for the Southern District of New York in its opinion granted respondent's motion for summary judgment against petitioner, who was sued individually and as executrix of the estate of Peter Meyer, deceased (R. 28a). The respondent, however, caused judgment to be entered only as against petitioner individually (R. 29a). Thereafter, by amended judgment, judgment was entered against petitioner individually and as executrix of the estate of Peter Meyer, deceased (R. 33a-34a). The petition for review herein is brought by petitioner in her individual capacity only to review the judgment of the United States Court of Appeals affirming the judgment entered against petitioner individually, and is not brought to review the said judgment affirming judgment against the estate of the said Peter Meyer, deceased, of which petitioner is the executrix.

Opinions Below

The opinion of the United States District Court for the Southern District of New York (R. 26a-28a) is reported in 202 F. Supp. 606, a copy thereof is set forth in the Appendix, *infra*, page 17. The opinion of the Court of Appeals for the Second Circuit (R. 38a) is reported in 309 F. 2d 131. A copy thereof is set forth in the Appendix, *infra*, page 19.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit sought to be reviewed is dated October 24, 1962, and said judgment was entered on October 24, 1962 (R. 38a-39a). A copy thereof is set forth in the Appendix *infra*, page 21.

Title 28, United States Code, Sec. 1254(1), confers on this Court jurisdiction to review said judgment of the Court of Appeals for the Second Circuit by writ of certiorari.

Questions Presented

(1) Where under New York law the proceeds of policies of life insurance payable to the widow, the beneficiary, are exempt from claims of creditors of the deceased insured, and the said deceased insured during his lifetime pledged and assigned in 1943 said policies to a bank as collateral security for the repayment of loans to the full amount of the surrender values of the policies (except for the sum of $441.21), prior to the tax liabilities of the said insured deceased which arose for the calendar years 1945 and 1946, and prior to assessments and notices and demands for payment for which were made in 1946 and 1947, and where the bank aforementioned received payment directly from the said insurance companies after the date of death of the insured to the full amount due on said loans, thus receiving the full surrender values of the policies (except for the sum of $441.21), and where the petitioner received from the insurance companies the balance of the proceeds of said policies, after death of the deceased insured, which balance formed no part of the cash surrender value (except for the sum of $441.21 which petitioner had offered to pay to respondent), was the decision of the United States Court of Appeals for the Second Circuit in affirming summary judgment against petitioner individually for the amount representing the tax liabilities of the deceased insured, contrary to the rule of law applicable to the case at bar, that the proceeds of the life insurance policies, except for the surrender values, are not property or rights to prop-

erty to which a lien of the United States, respondent, could attach, under Title 26, United States Code, Sec. 6321?

(2) Did the United States Court of Appeals for the Second Circuit correctly affirm the summary judgment against petitioner by marshalling the bank's prior claim against the balance of the proceeds at the insured's death on the basis of the decision of *United States* v. *Behrens*, 230 F. 2d 504 (2d Cir. 1956) cert. denied, 351 U. S. 919, even though in the *Behrens* case it was stated by the Court that the United States did not claim that it could recover, if no lien had attached to the surrender values during the lifetime of the insured?

(3) Did the United States Court of Appeals for the Second Circuit correctly apply to the case at bar the marshalling theory advanced in the case of *United States* v. *Behrens*, 230 F. 2d 504 (2d Cir. 1956) cert. denied, 351 U. S. 919, in which latter case the Government's tax lien did attach to the surrender values of life insurance policies during the lifetime of the insured, by reason of an assessment made prior to a bank pledge of the policies, but which tax lien for reason of non-filing had no priority over the pledge, thereby creating a tax lien against the surrender values, subject, however, to the pledge?

(4) Did the United States Court of Appeals for the Second Circuit correctly apply the foregoing marshalling theory to the case at bar where (with the exception of the sum of $441.21) no tax lien had attached to the cash surrender values of the policies during the life of the insured by reason of prior assignment and pledge to the bank?

(5) Did the United States Court of Appeals for the Second Circuit correctly affirm the summary judgment against the petitioner who did not receive any cash surrender values of the policies with tax liens attached (except $441.21), but received the remaining proceeds of the policies, which were exempt from tax liens by reason of Section 166 of the Insurance Law of the State of New York?

(6) Is the marshalling doctrine applicable to tax liens with respect to proceeds of life insurance exempt under State law, and if so, under what circumstances?

Statutes Involved

Title 26, United States Code; Section 6321. Lien for taxes:

> "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

Section 6322. Period of lien.

> "Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time."

Insurance Law of the State of New York, Section 166.

Exemption of proceeds and avails of certain insurance and annuity contracts.—

"1. If any policy of insurance has been or shall be effected by any person on his own life in favor of a third person beneficiary, or made payable, by assignment, change of beneficiary or otherwise, to a third person, such third person beneficiary, assignee or payee shall be entitled to the proceeds and avails of such policy as against the creditors, personal representatives, trustees in bankruptcy and receivers in state and federal courts of the person effecting the insurance. If any policy of insurance has been or shall be effected by any person upon the life of another person in favor of the person effecting the same or made payable, by assignment, change of beneficiary or otherwise, to such person, the latter shall be entitled to the proceeds and avails of such policy as against the creditors, personal representatives, trustees in bankruptcy and receivers in state and federal courts of the person insured; if the person effecting such insurance shall be the wife of the insured, she shall be entitled to the proceeds and avails of such policy as against her own creditors, trustees in bankruptcy and receivers in state and federal courts. If any policy of insurance has been or shall be effected by any person on the life of another person in favor of a third person beneficiary, or made payable, by assignment, change of beneficiary or otherwise, to a third person, such third person beneficiary, assignee or payee shall be entitled to the proceeds and avails of such policy as against the creditors, personal representatives, trustees in bankruptcy and receivers in state and federal courts of the person insured and of the person effecting the insurance.

The term 'proceeds and avails' shall include death benefits, cash surrender and loan values, premiums waived, and dividends, whether used in reduction of the premiums or in whatsoever manner used or applied, excepting only where the debtor has, subsequent to the issuance of the policy, actually elected to receive the dividends in cash. The person insured in a case under the first sentence of this subsection or the person effecting the insurance other than the wife of the insured in a case under the second sentence, and the person effecting the insurance under the third sentence thereof, or the executor or administrator of any such persons, or a person entitled to the proceeds or avails of such policy in trust for such persons shall not be deemed a third person beneficiary, assignee or payee. A policy shall be deemed payable to a third person beneficiary if and to the extent that, a facility-of-payment clause or similar clause, in the policy permits the insurer to discharge its obligation after the death of the person insured by paying the death benefits to a third person as herein defined. The provisions of this section shall be applicable whether or not the right is reserved in any such policy to change the beneficiary therein designated, and whether or not the policy is made payable to the person whose life is insured if the beneficiary, assignee or payee shall predecease such person; and no person shall be compelled to exercise any rights, powers, options or privileges under such policy."

Statement of the Case

This action was commenced on September 23, 1958, in the District Court of the United States for the Southern District of New York by the Government respondent against petitioner, Ethel Meyer, individually and as executrix of the estate of her deceased husband, Peter Meyer. The jurisdiction of the District Court was invoked through Sections 1340 and 1345 of Title 28, United States Code, for the reason that this is a civil action arising under the Internal Revenue Laws of the United States and is brought by the United States as a party plaintiff. The answer was served and filed on November 18, 1958.

On June 29, 1943, petitioner's husband, Peter Meyer, the insured under life insurance policies totaling $50,000, pledged and assigned same to the Huntington National Bank of Columbus, Ohio, as collateral security to the bank for the repayment of loans (R. 20a, 22a, 25a, 26a). The amount due on said loans on December 28, 1955, the date of death of the insured, was the sum of $26,844.66 (R. 13a, 20a, 24a, 26a). Said loans represented the full cash surrender value of the policies, less the sum of $441.21 (R. 12a, 25a, 27a). Upon the death of said Peter Meyer, the insurance companies paid to the Huntington National Bank of Columbus, Ohio, the said sum of $26,844.66, and the balance due under said policies was paid by them to petitioner, the beneficiary under the policies (R. 24a).

Subsequent to the pledge and assignment to the bank made on June 29, 1943, the tax liabilities of Peter Meyer arose for the calendar years 1945 and 1946 (R. 22a, 26a). One assessment, pertaining to 1945, was made on May 22, 1946, and notice and demand for payment was made on June 6, 1946, upon said Peter Meyer (R. 5a, 18a). The other assessment pertaining to 1946 was made on June

17, 1947, and notice and demand for payment was made on June 18, 1947, upon said Peter Meyer (R. 5a, 6a, 18a). As a result of said assessments there became due to the United States from Peter Meyer and subsequently from the estate of Peter Meyer the sum of $6,159.09 with interest (R. 7a, 18a). Notice of lien in the sum of $6,159.09 plus interest was filed on July 11, 1955, in the Register's Office, Hall of Records, New York, N. Y. (R. 5a, 6a, 18a, 19a).

Respondent moved for summary judgment against petitioner, individually and as executrix of the estate of her husband, Peter Meyer, which motion was granted (R. 28a), but respondent entered judgment against her individually only (R. 29a). Petitioner appealed from said judgment to the United States Court of Appeals for the Second Circuit on March 14, 1962 (R. 30a). Subsequently, and after serving and filing of petitioner's briefs in the United States Court of Appeals, respondent moved before the United States Court of Appeals to remand the action to the District Court for the purpose of moving before the District Court to amend the judgment *nunc pro tunc* to read that respondent have judgment against petitioner individually and as executrix of the estate of Peter Meyer, deceased, which motions were granted and an amended judgment was signed accordingly (R. 33a, 34a).

Petitioner maintains that judgment was properly entered against the estate of her late husband herein, but that since she was not liable personally, the motion for summary judgment should not have been granted against her personally and that the judgment against her personally should be vacated and set aside.

The position of petitioner with respect to her individual liability was and is to the effect that except for the sum

of $441.21, representing the cash surrender value received by her, which she offered to pay to respondent (R. 12a, 14a, 22a), there is no liability on her part for receiving, after payment to the bank under its assignment and pledge of the policies, the balance of the proceeds of the policies which did not constitute property or property rights of the insured, to which the tax liens of respondent could attach during the life of the insured, by reason of exemption under Section 166 of the New York Insurance Law.

The District Court wrote an opinion (Appendix, p. 17) and granted respondent's motion for summary judgment (R. 28a-29a), on the basis of the decision in the case *United States* v. *Behrens*, 230 F. 2d 504 (2d Cir. 1956), cert. denied; 351 U. S. 919. On appeal, the United States Court of Appeals for the Second Circuit wrote an opinion (Appendix, p. 19) and affirmed the judgment (Appendix, p. 21) in reliance upon the said *Behrens* case, *supra*.

Reasons Relied on for the Allowance of the Writ

1. The United States Court of Appeals has decided an important question of federal law, which has not been, but should be, settled by this Court.

The United States Court of Appeals in affirming the judgment against petitioner individually and holding her liable to the extent of the tax liabilities of her late husband the insured, predicated its decision on the case of *United States* v. *Behrens*, 230 F. 2d 504 (2d Cir. 1956) cert. denied, 351 U. S. 919, which adopted the equitable doctrine of marshalling, as applicable to the remaining proceeds of a life insurance policy (being the face amount less cash surrender value) received by a beneficiary which

are exempt under state law from any claims of creditors. Said remaining proceeds are not considered "property" or "property rights" to which a tax lien may attach under Title 26, United States Code, Section 6321.

United States v. *Bess*, 357 U. S. 51, 55-56 (dec. 1958).

In the case at bar, Section 166 of the New York Insurance Law exempted such proceeds from claims of creditors. Despite the fact that the tax liens herein arose in 1946 and 1947, and did not during the life of the insured attach to the policies' surrender values which were assigned and pledged prior thereto, in 1943, the lower Court adopted the marshalling doctrine expressed in the *Behrens* case under facts there, differing materially from the present case. Petitioner did not receive any part of the surrender value (except for the sum of $441.21) and was held liable, nevertheless.

The United States Supreme Court has not decided any case which applied the marshalling doctrine or theory as expressed in the *Behrens* case, nor under what factual circumstances it will be applied.

Assuming were this Court to determine that the equitable doctrine of marshalling is applicable to tax claims or liens, the *Behrens* case, *supra,* is clearly distinguishable and not applicable herein. The facts in the *Behrens* case, *supra*, were as follows: An assessment of a tax lien was made first, thereby creating a lien on all property, i.e., the surrender value of the policy. However, the tax lien wasn't filed, and therefore it was an inferior lien to that of a bank which had subsequently loaned the insured moneys on assignment and pledge of the policy. But a lien did arise in favor of the Government on the

cash surrender value, which was, however, a secondary lien to that of the bank. As was stated by the Court in the *Behrens* case, *supra*:

> "The tax lien, not being filed, did not indeed have priority over the pledge; * * *."

Significantly, the Court in the *Behrens* case, *supra*, at page 506, said:

> "The United States does not assert that it could recover, if no lien had attached to the 'surrender values' during Behren's life;"

In the case at bar the tax liens arose in 1946 and 1947 and did not during the life of the insured attach to the prior assignment and pledge of the surrender values to the bank for its loan to the insured in 1943. Assuming, therefore, that the marshalling doctrine is applicable to cases involving tax liens as affecting proceeds of life insurance, exempt by state law, the question of when or under what circumstances it is applicable has not been determined by this Court.

The United States Court of Appeals herein endeavored to reconcile the instant case with the *Behrens* case, *supra*, stating: "In the present case by reason of prior pledge of the policies to the bank the government's tax lien was secondary, but it was not nugatory, and the proceeds passed to appellant subject to both claims at the taxpayer's death" (Appendix, *infra*, page 19). It is respectfully submitted that this reasoning can not apply to this case. The prior *assignment and pledge* of the policies to the bank did not leave any cash surrender value (except $441.21), to which the government's tax lien could attach during the life of the insured. Of course, the tax lien of the government was not "nugatory", in the sense that if there were *other* property that it could attach to dur-

ing the life of the insured, it would be effective as to that *other* property. But in this case the tax lien of the government did not attach during the life of the insured since it is evident that there was not only an assignment but a pledge as well to the bank (R. 25a). After assignment and pledge to the bank, the tax lien did not attach during insured's lifetime to said cash surrender values so assigned and pledged to the bank.

Contrary to what the learned lower Court also stated, the proceeds did not pass to petitioner subject to both claims at the taxpayer's death. The bank was paid directly by the insurance company, and petitioner was paid the remaining proceeds not embracing any surrender value (except $441.21) which were exempt from creditor's claims under Section 166 of the Insurance Law of the State of New York.

Also, petitioner did not receive the full amount of the policies and did not pay the "surrender value" or the amount borrowed to the bank, as was the fact in the *Behrens* case. Petitioner received the proceeds of the policies (face amount less amount borrowed) as a beneficiary and not as a creditor.

Clearly, the question presented is of importance in the administration of federal tax laws. Settlement of the question by this Court is plainly in the public interest, since it is likely to be presented in numerous tax claims and liens of the Federal Government affecting proceeds payable to beneficiaries under life insurance policies.

2. The decision of the learned Court below is believed to be erroneous since it has decided the federal question in a way in conflict with applicable decisions of this Court.

It has been shown under number 1. of the "Reasons Relied On for the Allowance of the Writ," that the re-

spondent's tax lien did not during insured's lifetime, attach to the cash surrender values which had been assigned and pledged to the bank for a loan, before even any tax claim existed.

In the case of *Commissioner* v. *Stern*, 357 U. S. 39 (1958), decided two years after the *Behrens* case, *supra*, this Court held that recovery of unpaid federal income taxes from the beneficiary of life insurance in the absence of a lien was disallowed under a state statute (Kentucky) similar to Section 166 of the Insurance Law of the State of New York, applicable herein, exempting proceeds of life insurance from the insured's creditors unless premiums have been paid in fraud of creditors.

The same day that this Court decided the case of *Commissioner* v. *Stern, supra*, it also decided the case of *United States* v. *Bess*, 357 U. S. 51 (dec. 1958), wherein it was held that because of tax liens which had attached to all of the insured's property before his death, the beneficiary was liable to the extent of the cash surrender values of his policies, received by her. The case did not involve any prior pledge, assignment or transfer of cash surrender values, as in the case at bar.

At page 54, the Supreme Court in the *Bess* case, *supra*, stated:

> "If in the instant case no lien were involved, our holding in *Commissioner* v. *Stern* would require an affirmance in No. 395 and a reversal in No. 410, since it is conceded that Mr. Bess did not pay any premiums in fraud of his creditors."

The Court in the *Bess* case, *supra*, in discussing the proceeds of a policy (applicable to the case at bar), as

distinguished from the cash surrender value subject to a tax lien, stated as follows at pages 55-56:

> "Manifestly the insured could not enjoy the possession of the proceeds in his lifetime. His right to change the beneficiary, even to designate his estate to receive the proceeds, gives him no right to receive the proceeds while he lives. Cf. *Rowen* v. *Commissioner*, 215 F. 2d 641, 644. It would be anomalous to view as 'property' subject to lien proceeds never within the insured's reach to enjoy, and which are reducible to possession by another only upon the insured's death when his right to change the beneficiary comes to an end. We therefore do not believe that Mr. Bess had 'property' or 'rights to property' in the proceeds, within the meaning of Sec. 3670 (present Sec. 6321) to which the federal tax lien might attach. *Cannon* v. *Nichols*, 80 F. 2d 934; see *United States* v. *Burgo*, 175 F. 2d 196."

The Court in the *Bess* case went into a full discussion of the applicable law and said at page 57 as follows:

> "The question therefore is whether the cash surrender values with the lien attached were transferred to Mrs. Bess as beneficiary when Mr. Bess died."

In the case at bar, therefore, no lien attached to the prior pledge, transfer and assignment of the cash surrender value to the bank, and the proceeds which petitioner, the widow, received, not embracing any surrender value (except $441.21), was not subject to any tax lien by reason of Section 166 of the Insurance Law of the State of New York.

Petitioner, upon the death of her husband, received as beneficiary the proceeds of the policies, representing the balance after payment to the bank by the insurance companies of the moneys due it on the loan. Thus the only cash surrender value which petitioner received was the sum of $441.21, which were the only moneys subject to the tax liens. All proceeds received by petitioner over and above said sum of $441.21 were entirely exempt and not subject to any tax lien. Said proceeds were not "property" or "rights to property", and were not subject to the tax liens.

United States v. *Bess*, 357 U. S. 51, 55-56 (*supra*); Sec. 166 of the Insurance Law of New York.

For all the foregoing reasons, there was no liability on the part of the petitioner except for the sum of $441.21.

It is therefore respectfully submitted that the learned lower Court decided the federal tax question in a way in conflict with applicable decisions of this Court.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

1. Opinion of the United States District Court for the Southern District of New York

OPINION BY PALMIERI, J.

The United States has moved for summary judgment in an action by it against Ethel Meyer, individually and as executrix of her husband's estate, for $6,159.09, plus interest. This amount is due on taxes assessed against Peter Meyer for the years 1945 and 1946. Notice of the tax assessments was given and demand made in 1946 and 1947 respectively, thereby giving rise to a "lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to" the decedent. 26 U. S. C. §6321.

The Government seeks to recover the money owed it out of insurance proceeds received by Ethel Meyer as the beneficiary of several policies on the life of Peter Meyer. The policies had a face value of $50,000 and a cash surrender value of $27,285.87. The policies permitted decedent to change the beneficiary and to demand the cash surrender value. In 1943, prior to the tax assessments, the insured had pledged and assigned the policies to the Huntington National Bank of Columbus, Ohio, as security for a loan of $26,844.66. Under the terms of the assignment, the bank was given the right to satisfy its claim out of the net proceeds of the policy when it became a claim by death. Upon the death of Peter Meyer the bank was paid $26,844.66 and the remainder of the proceeds were paid to Ethel Meyer.

In *United States* v. *Bess*, 357 U. S. 51 (1958), the Supreme Court held that if the cash surrender value of

a life insurance policy is property under the applicable state law it is property under 26 U. S. C. §6321, and a federal tax lien attaches to it and continues to exist after the taxpayer's death. The defendant does not contest her deceased husband's tax liability nor does she dispute that a federal tax lien may attach to the cash surrender value of life insurance policies. She contends, however, that the debt to the bank was paid out of the cash surrender value, leaving the difference between the cash surrender value of the policy and the amount paid to the bank, $441.21, for enforcement of the Government's lien. This contention is directly contrary to this Circuit's holding in *United States* v. *Behrens*, 230 F. 2d 504 (2d Cir. 1956).

The defendant in *Behrens* was the beneficiary of a number of insurance policies on the life of her husband which had a cash surrender value of $22,000 and a face value of $59,000. The policies had been pledged to a bank for a loan of $17,000 which defendant was obliged to pay. Judge Learned Hand denied her contention that she was entitled to deduct this amount from the cash surrender value and permitted plaintiff to enforce its tax lien against the full amount of the cash surrender value, saying:

> "The tax lien * * * did not indeed have priority over the pledge; but the 'proceeds' were large enough to pay both claims, and it is well settled law that, when one creditor has a claim against two funds as security and another creditor has a claim against only one of them, the loan of the first will be marshalled against that fund which is security for his loan only" (p. 507).

Applying this rule to the instant case, it follows that the Government is entitled to enforce its tax lien against

the full amount of the cash surrender value notwithstanding payment to the bank of the loan for which the policies were assigned and pledged.

Plaintiff's motion for summary judgment is granted. Submit order on notice.

Dated: New York, N. Y.
January 12, 1962

Edmund L. Palmieri

EDMUND L. PALMIERI
U. S. D. J.

---

2. Opinion of the United States Court of Appeals for the Second Circuit

PER CURIAM:

The decedent pledged life insurance policies to a bank as collateral security for a loan. Thereafter he was assessed certain deficiencies in payment of income tax. At the time of his death both the loan and the assessments remained unpaid. Payment of the loan exhausted the cash surrender value of the policies except for an amount too small to pay the deficiency assessments. The Government seeks to recover the tax liabilities from the proceeds of the insurance policies.

As the District Court held, 202 F. Supp. 606, this case is controlled by *United States* v. *Behrens*, 230 F. 2d 504 (2d Cir. 1956), *cert. denied*, 351 U. S. 919, which held that

> "when one creditor has a claim against two funds as security and another creditor has a claim against only one of them, the loan of the first will be marshalled against that fund which is security for his loan only." (p. 507).

Appellant attempts to distinguish the *Behrens* case on the ground that in that case the government's assessment was made prior to the taxpayer's pledge of the policies, whereas here the pledge preceded the assessment. Appellant argues that the lien could attach only to the excess of the surrender value over the amount of the loan. But in *Behrens*, the "tax lien, not having been filed, did not indeed have priority over the pledge" (p. 507). In the present case by reason of the prior pledge of the policies to the bank the government's tax lien was secondary, but it was not nugatory, and the proceeds passed to appellant subject to both claims at the taxpayer's death. Whatever the value of the tax lien during the taxpayer's lifetime, it could be fully satisfied out of that portion of the proceeds representing the former cash surrender value by marshalling the bank's prior claim against the balance of the proceeds at his death.

Judgment affirmed.

3. Judgment of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the twenty-fourth day of October, one thousand nine hundred and sixty-two.

Present: HON. STERRY R. WATERMAN
HON. PAUL R. HAYS
HON. THURGOOD MARSHALL
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ETHEL MEYER, individually and as Executrix of the ESTATE OF PETER MEYER, deceased,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 757

ETHEL MEYER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. 17–19) is reported at 202 F. Supp. 606. The opinion of the court of appeals (Pet. 19–20) is reported at 309 F. 2d 131.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 1962 (Pet. 21). The petition for a writ of certiorari was filed on January 18, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether the courts below correctly held that federal tax liens upon the cash surrender value of life insur-

ance policies, which had been assigned prior to the assessment of the taxes as security for a bank loan, could be satisfied out of the proceeds of the policies that remained after the bank loan had been paid.

STATUTES INVOLVED

Internal Revenue Code of 1939:

SEC. 3670. PROPERTY SUBJECT TO LIEN.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U.S.C. 1952 ed., 3670.)

SEC. 3671. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

(26 U.S.C. 1952 ed., 3671.)

Internal Revenue Code of 1954:

SEC. 6323. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*—Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be

valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—

* * * * *

(26 U.S.C. 6323.)

SEC. 7403. ACTION TO ENFORCE LIEN OR TO SUBJECT PROPERTY TO PAYMENT OF TAX.

(a) *Filing.*—In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary or his delegate, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability.

* * * * *

(26 U.S.C. 7403.)

STATEMENT

Peter Meyer owned four life insurance policies of which his wife was the beneficiary. He retained the right to change the beneficiary, demand the cash surrender value and assign the policies. The face amounts of the policies totaled $50,000, and the cash surrender values at his death on December 28, 1955, totaled $27,285.87. (Pet. 17; R. 18a–19a.)

At the date of his death, Meyer owed income taxes to the United States for the years 1945 and 1946, totaling $6,159.09, plus interest. The taxes due for 1945 had been assessed in May, 1946, and those due for 1946 had been assessed in June, 1947. Notice of assessment and demand for payment was made upon Meyer by the Collector and notice of lien was filed by the District Director in July, 1955. (Pet. 17; R. 18a.)

In 1943, prior to the tax assessments, Meyer pledged and assigned the policies to the Huntington National Bank of Columbus, Ohio, as security for a loan of $26,844.66. Under the terms of the assignment or pledge, the bank was also given the right to satisfy its claim out of the "net proceeds of the policy when it becomes a claim by death." (Pet. 17; R. 20a.) Upon the death of Meyer, the insurance company paid the bank $26,844.66 and paid the remainder of the proceeds to Ethel Meyer, his widow (Pet. 17; R. 20a, 24a–25a).

In September, 1958, the United States commenced suit against Mrs. Meyer individually and as executrix of the estate of her husband for $6,159.09, the amount of Meyer's unpaid 1945 and 1946 income taxes, plus interest (R. 4a–11a). The district court granted the government's motion for summary judgment, holding that the United States could satisfy its tax lien on the cash surrender value of the policies out of the proceeds of the insurance received by Mrs. Meyer (Pet. 17–18; R. 29a). The court of appeals affirmed.

ARGUMENT

The decision below is correct. There is no conflict between two circuits or other occasion for review.

1. The court below correctly held that the federal tax lien on the cash surrender value of the taxpayer's insurance policies, which had been assigned as security for a prior bank loan, could be satisfied out of the proceeds of the policies. The ruling is fully supported by this Court's holding in *United States* v. *Bess*, 357 U.S. 51, that the federal tax lien, arising during the taxpayer-insured's lifetime, attaches to the cash surrender value of the insurance and may be collected from the proceeds in the hands of the beneficiary. The rationale of *Bess* is that the proceeds of an insurance policy represent two funds, the cash surrender value "plus another amount sufficient to perform the insurer's promise to pay the proceeds on the insured's death" (357 U.S., p. 59). In *Bess* this Court said that the cash surrender value is the taxpayer's property during his lifetime; and that such amount represents, in a level premium policy, the excess of early premiums over amounts needed to pay for current insurance, which is held by the insurer for the sole purpose of paying premiums in later years, to be returned to the insured if not so used.

The only difference between *Bess* and the instant case is that here the taxpayer had assigned the insurance policies as security for a bank loan prior to the federal tax lien, and that the loan was repaid at the taxpayer's death by the insurer before the proceeds were turned over to the taxpayer's beneficiary, the

petitioner here. These facts do not alter the applicability of the *Bess* ruling. After the assignment of the policy to the bank as security for its loan, the taxpayer retained a continuing interest in the cash surrender value to which the federal tax lien applied, since he could at any time secure the cash surrender value by paying the bank loan. See *United States* v. *Peoples Bank*, 197 F. 2d 898 (C.A. 5); *United States* v. *Boyd*, 246 F. 2d 477 (C.A. 5), certiorari denied, 355 U.S. 889.

Since the insurance company had a claim against both the "net proceeds of the policy when it became a claim by death" (Pet. 17) and the cash surrender value, while the United States had a claim against only the latter, the court below properly marshalled the assets "upon the principle that a creditor having two funds to satisfy his debt, may not by his application of them to his demand, defeat another creditor, who may resort to only one of the funds." *Sowell* v. *Federal Reserve Bank*, 268 U.S. 449, 457. The court therefore correctly treated the insurance company's claim as having been paid out of the general proceeds of the policy, thus permitting the federal tax claims to be satisfied out of the portion of the proceeds representing the cash surrender value.

2. There is no conflict of decisions. The court below followed its earlier decision in *United States* v. *Behrens*, 230 F. 2d 504, certiorari dened, 351 U.S. 919. There the court relied on the two-fund character of life insurance proceeds as a basis for similarly marshalling assets in order to satisfy both a federal tax lien and a

bank loan out of such proceeds. To the same effect, see *United States* v. *Wintner*, 200 F. Supp. 157 (N.D. Ohio), affirmed *per curiam*, C.A. 6, January 18, 1963.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1963.

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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 61.

ETHEL MEYER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

MOTION OF LILLIAN WINTNER FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE, AND BRIEF OF LILLIAN WINTNER AS AMICUS CURIAE.

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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 61.

ETHEL MEYER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

MOTION OF LILLIAN WINTNER FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

Lillian Wintner respectfully moves this Court for leave to file the accompanying brief in this case as *amicus curiae*. The attorney for petitioner herein has refused to consent to the filing of such brief, but the attorney for respondent herein has consented to such filing.

The applicant's interest in this case arises from the fact that her petition for certiorari in the case of Lillian Wintner vs. United States of America, October Term, 1963, No. 98, is pending before the Court. There is an issue in her case (with respect to which the respondent did not oppose certiorari) which is substantially identical to an issue here. Accordingly, the Court's decision in this case may affect the outcome in her case if her petition for certiorari is granted.

The facts herein indicate that petitioner's husband pledged policies of insurance on his life to a bank as collateral security for the repayment of a loan prior to the time when a lien for unpaid federal income taxes arose

against these policies. In the petition for certiorari, Questions 1-5, inclusive, of the statement of "Questions Presented" and the "Reasons Relied on for the Allowance of the Writ" indicate that petitioner intends to confine her argument to the sole legal question of whether, because of the prior pledge of the policies to the bank, petitioner's husband had any property or rights to property remaining in the policies to which the Government's lien could attach.

The applicant believes there is an important question involved which is relevant to the disposition of this case but which may not be presented by the parties, although it was decided by the courts below. The applicant is of the opinion that a further issue is presented if it is held by the Court that the decedent had property or rights to property in the insurance policies notwithstanding their prior pledge to the bank. This question is:

> Where the bank's lien on the cash surrender value of the policies is superior to the lien of the United States, where the amount of the loans approximately equals the cash surrender value of the policies, where the applicable state law exempts the proceeds of the policies from claims of the insured's creditors, and where the principles of equity prohibit the marshaling of assets in such a situation, should the cash surrender value of the policies first be applied to pay the prior lien of the bank on the decedent's death so that almost nothing remains against which the United States might enforce its lien?

Unless the equitable doctrine of marshaling assets is applied, payment of the bank's prior lien on the cash surrender value practically exhausts that value and leaves nothing for the government.

Wherefore, so that the foregoing question may be presented, the applicant moves the Court for an order permitting the filing of the accompanying brief.

Respectfully submitted,

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BRIEF OF LILLIAN WINTNER, AMICUS CURIAE.

ARGUMENT.

The following argument proceeds on the assumption that the United States had a lien on the cash surrender value of Mr. Meyer's insurance policies during his lifetime, notwithstanding the fact that Mr. Meyer pledged the policies to a bank as collateral security for a loan prior to the government's assessment of the income tax deficiencies.

In *United States vs. Bess*, 357 U. S. 51 (1958), (wherein no pledge of the policies had been made) this Court held that the cash surrender value of an insurance policy is a separate fund to which a federal tax lien may attach and that at the death of the insured there is a transfer of this fund with the lien attached. This Court also held that the proceeds of a policy in excess of the cash surrender value (which amount is hereinafter referred to as "the excess") constitute another separate fund to which a tax lien may not attach. In the instant case, therefore, assuming that the government had a valid lien, this lien attached only to the cash surrender value of the policies, but the lien of the Huntington National Bank of Columbus, Ohio, attached to both the cash surrender value and to the excess.

The government's lien on the cash surrender value was second in priority to that of the bank on the cash surrender value, because the government's assessment was made after the pledge to the bank had been made. The first lien in time is the first in right. *United States vs. New Britain*, 347 U. S. 81 (1954).

At the time of Mr. Meyer's death, the cash surrender value was $27,285.87, the amount owing to the bank was $26,844.66, the tax deficiency was $6,159.09 plus interest,

and the excess was $22,714.13. The question which results is whether the $26,844.66 owing to the bank should have been paid from the fund consisting of the cash surrender value or from the fund consisting of the excess. If the bank was paid from the cash surrender value of $27,285.87, then only $441.21 remained of this fund for the United States; if it was paid from all of the $22,714.13 comprising the excess and from $4,130.53 of the cash surrender value, then $23,155.34 of the cash surrender value remained for the satisfaction of the United States' lien of $6,159.09 plus interest. This is a problem of resolving the rights of competing creditors.

The courts below applied the equitable doctrine of "marshaling assets," to the effect that when one creditor has a claim against two funds as security and another creditor has a claim against only one of the funds, the loan of the first creditor will be marshaled against that fund which is security for his loan only. See also *United States vs. Behrens*, 230 F. 2d 504 (2d Cir. 1956); *United States vs. Wintner*, 200 F. Supp. 157 (D. C. N. D. Ohio 1961), aff'd 312 F. 2d 749 (6th Cir. 1963). These courts determined that the bank had been paid out of the fund consisting of the excess, thereby leaving the fund consisting of the cash surrender value intact for satisfaction of the lien of the United States.

The problem thus narrows to an examination of the relevance of this doctrine of "marshaling assets" in resolving the rights of competing lienors where one of the liens is a United States income tax lien. This doctrine is a part of equity jurisprudence:

> "The doctrine of marshaling is not an absolute rule of law, or an absolute right, or a matter of legal right; marshaling is not founded on contract; nor is it a lien or a vested right or interest. It is founded in

> principles of natural justice, and is applied when the ends of justice require its application; it has regard to the rights of all who have interests in the property involved, and applies only when it can be applied equitably and with justice, both to the creditor and to his debtor, as well as to third persons, * * *" 55 C. J. S., *Marshaling Assets and Securities* § 1, p. 959.

Being a part of equity jurisprudence, the doctrine is not peculiar to either state law or to federal law alone, but may be found in both. Cf. *Sowell vs. Federal Reserve Bank*, 268 U. S. 449 (1925); *Scruggs vs. Memphis & Charleston R. Co.*, 108 U. S. 368 (1883).

In determining whether the equities of the parties require the application or non-application of the doctrine, the cases have held that reference to state law may be necessary. Thus, the weight of authority is that marshaling will *not* be invoked so as to deprive a debtor of property which has been exempted by state statute from the claims of creditors. This aspect of the doctrine has been stated as follows:

> "* * * The weight of authority holds that, in the light of the public policy purpose in the creation of homestead exemptions, marshaling cannot be invoked so as to deprive a debtor of his homestead or other exempt property; if one creditor may at his election resort to either the homestead or other property to satisfy his demand and another creditor can reach only the non-homestead property, the latter cannot compel the former first to resort to the homestead premises. Thus, a mortgagee of nonexempt land cannot compel a mortgagee of both homestead and nonexempt property to go against a homestead exclusively, nor can a judgment creditor whose judgment binds land other than the homestead put a mortgagee of both tracts to his election of the homestead as his security; * * *" 55 C. J. S., *Marshaling Assets and Securities* § 10, pp. 969-970.

See also 35 AM. JUR., *Marshaling Assets and Securities* § 16, pp. 393-394; Annotations in 44 A. L. R. 758 and 77 A. L. R. 371; 2 STORY, EQUITY JURISPRUDENCE § 871 (14th ed. 1918).

The federal courts have accepted this principle of the non-applicability of the doctrine of marshaling assets where one of the funds is exempt under state law. See *In re Bailey*, 176 Fed. 990 (D. C. Utah 1910); *In re Cogbill*, 2 Hughes 313, 6 Fed. Cas. No. 2954 (D. C. E. D. Va. 1877); Cf. *Moody vs. Century Savings Bank*, 239 U. S. 374 (1915); *Lockwood vs. Exchange Bank*, 190 U. S. 294, 300-301 (1903). But cf. *In re Meredith*, 144 Fed. 230 (D. C. N. D. Ga. 1906); *Abbott vs. Powell*, 6 Sawyer 91, 1 Fed. Cas. No. 13 (D. C. Calif. 1879); *In re Sauthoff*, 7 Biss. 167, 21 Fed. Cas. No. 12379 (D. C. W. D. Wis. 1876).

Under Section 166 of the Insurance Law of the State of New York, the proceeds of insurance are exempt from the claims of creditors of the insured:

> "1. If any policy of insurance has been or shall be effected by any person on his own life in favor of a third person beneficiary, or made payable, by assignment, change of beneficiary or otherwise, to a third person, such third person beneficiary, assignee or payee shall be entitled to the proceeds and avails of such policy as against the creditors, personal representatives, trustees in bankruptcy and receivers in state and federal courts of the person effecting the insurance * * *."

Accordingly, the doctrine of marshaling assets is not applicable to this case.

The non-applicability of the doctrine of marshaling assets is not limited to cases where the exempt fund is homestead property. Thus, in the leading case of *Barbin vs. Moore*, 85 N. H. 362, 159 Atl. 409 (1932), Mr. Laclerc borrowed $9,000 from a bank and pledged two insurance

policies as collateral security for the repayment thereof; he also gave a mortgage on his real estate to the bank. The beneficiaries of the insurance policies were his children. When Mr. Laclerc died, there was still a sum owing to the bank. The insurer paid the bank that sum, and the bank discharged the mortgage. The administrator of Mr. Laclerc's estate then sold the real estate, and the guardian of the children sought to recover from the administrator the amount which had been paid to the bank from the insurance proceeds. The administrator was in the position of representing other creditors of the decedent, since if the children were able to recover from the estate the amount which had been paid from the insurance proceeds, then the estate would have been insolvent. Noting that the bank had a lien both on the insurance policies and on the real estate while the other creditors had a claim against only the real estate, the creditors of the estate sought to apply the doctrine of marshaling assets in order to require a holding that the bank had received payment from the insurance policies, so that the funds resulting from the sale of real estate would be available solely to them. The Supreme Court of New Hampshire rejected this contention, saying:

> "* * * Assuming that the defendant is in a position to assert a right to marshaling as far as the nature of the claims he represents is concerned, the question to be considered is whether occasion for such relief is shown. The bank having two funds to look to and the general creditors but one, they assert the right to compel the bank to take its pay from the fund not available to them.
>
> "The statute is a conclusive answer to the claim thus made. As to the insurance, the beneficiaries' rights are superior to those of the creditors. In the language of the statute, the beneficiaries hold the insurance against the claims of the creditors or repre-

sentatives of the party effecting the same.' P. L. c. 277, § 2. * * * In a very practical sense the defendant here seeks to assert a claim upon the insurance. This the statute forbids.

* * *

"And it may be added that marshaling is never ordered to the prejudice of a third party having equal equity. The statute having made the claims of the beneficiaries superior to those of general creditors, it is clear that this rule forbids the application of marshaling as against the former and in favor of the latter." 159 Atl. 409, 416-417.[1]

It is therefore clear in the instant case that the United States cannot require the Huntington National Bank of Columbus to be repaid from the excess and that the bank instead collected from the cash surrender value of the policies, leaving only $441.21 to be applied against the United States lien.[2]

The reference to the state-created exemption[3] under

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[1] See also West Grove Savings Bank vs. Dunlavy, 190 Iowa 1054, 181 N. W. 404 (1921), and Pugh vs. Whitsitt, 161 S. W. 953 (Tex. Civ. App. 1913), refusing to apply the doctrine where a head-of-a-household exemption was involved. The same public policy which requires the non-applicability of the doctrine where exempt homestead property is involved also requires its non-applicability where exempt insurance proceeds are involved. Any reliance on *Behrens, supra*, to the contrary is misplaced, since there the court simply recited the broad doctrine of marshaling assets; it did not consider the effect of exempt property on that doctrine. Any reliance on Merchants' & Mechanics' Bank v. Sewell, 61 F. 2d 814 (5th Cir. 1932), is misplaced for the same reason and also because the proceeds of the policies were not involved, the insured not having died.

[2] The United States cannot proceed against the excess on a transferee theory because of Section 166 of the Insurance Law of the State of New York. Commissioner vs. Stern, 357 U. S. 39 (1958).

[3] This reference to a state-created exemption does not violate the rule that the government is not subject to state exemp-

(*Continued on following page.*)

Section 166 to determine the applicability of the doctrine of marshaling assets in this case is proper under the prior holdings of this Court. In *Aquilino vs. United States*, 363 U. S. 509 (1960), this Court held that the first question in any tax lien case is whether and to what extent the taxpayer had "property" or "rights to property" to which the tax lien could attach. This is resolved by state law's determining the nature of the legal interest which the taxpayer had in the property. See *Bess, supra*. As noted above, *amicus* is here assuming that Mr. Meyer had such an interest to which the lien of the United States could attach, notwithstanding his prior pledge of the policies to the bank; otherwise, the issue of the applicability of the doctrine of marshaling assets is not reached.

This Court has also heretofore made it clear that once the tax lien has attached to the taxpayer's state-created interests, federal law determines the priority of competing liens asserted against the taxpayer's "property" or "rights

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(*Continued from preceding page.*)

tion laws in collecting tax liabilities. See *Bess, supra;* Fink vs. O'Neil, 106 U. S. 272 (1882); United States vs. Hoper, 242 F. 2d 468 (7th Cir. 1957); Fried vs. New York Life Insurance Co., 241 F. 2d 504 (2nd Cir.), cert. denied *sub nom.* Fried vs. United States, 354 U. S. 922 (1957); United States vs. Heffron, 158 F. 2d 657 (9th Cir. 1947); Kyle vs. McGuirk, 82 F. 2d 212 (3rd Cir. 1936); Cannon vs. Nicholas, 80 F. 2d 934 (10th Cir. 1935); Knox vs. Great West Life Assurance Co., 109 F. Supp. 207 (D. C. E. D. Mich. 1952), aff'd. 212 F. 2d 784 (6th Cir., 1954); Smith vs. Donnelly, 65 F. Supp. 415 (D. C. E. D. La. 1946). These cases hold only that state statutes which exempt certain property from the claims of creditors may not be applied to prevent the *attachment* of the government's lien for taxes. This principle is not disputed here. If Mr. Meyer's pledge of the policies to the bank did not dispose of all of his property or rights to property in the policies, then a lien did arise upon the cash surrender value of the policies in favor of the government, and the New York statutes cannot prevent the attachment of this lien. But this is not the answer; it is only the assumed starting point. The question which must be answered, and upon which the above cases do not bear, is from which fund the bank was paid.

to property." *United States vs. Buffalo Savings Bank*, 371 U. S. 288 (1963); *Aquilino, supra; United States vs. Acri*, 348 U. S. 211 (1955); *New Britain, supra*. However, there is no problem of determining priorities here since there is no question that the bank's lien, being prior in time, was prior in right to that of the United States. *New Britain, supra*. The doctrine of marshaling assets is not reached, in fact, unless the problem of priority has first been resolved.

The doctrine of marshaling assets, being a principle of equity jurisprudence, is of that body of law which is peculiar to neither federal nor state law. It is, however, undeniably a part of federal law. It requires an examination of the equities of the parties. One of these equities is the exemption of insurance proceeds decreed by the statutorily-expressed public policy of the State of New York. 35 AM. JUR., *Marshaling Assets and Securities* § 16, pp. 393-394.

Furthermore, the prior decisions of this Court have not excluded any reference to state law even in resolving the rights of competing creditors. On the contrary, in dealing with the problem of the divestiture of federal liens in foreclosure proceedings, in *United States vs. Brosnan*, 363 U. S. 237 (1960), this Court held that there is no federal law with respect to creditors' rights and that the enforcement of such rights is a matter of state law:

> "We nevertheless believe it desirable to adopt as federal law state law governing divestiture of federal tax liens, except to the extent that Congress may have entered the field. It is true that such liens form part of the machinery for the collection of federal taxes, the objective of which is 'uniformity, as far as may be.' United States vs. Gilbert Associates, Inc., 345 U. S. 361, 364. However, when Congress resorted to the use of liens, it came into an area of complex property relationships long since settled and regulated by state

law. We believe that, so far as this Court is concerned, the need for uniformity in this instance is outweighed by the severe dislocation to local property relationships which would result from our disregarding state procedures. Long accepted non-judicial means of enforcing private liens would be embarrassed, if not nullified where federal liens are involved, and many titles already secured by such means would be cast in doubt. We think it more harmonious with the tenets of our federal system and more consistent with what Congress has already done in this area, not to inject ourselves into the network of competing private property interests, by displacing well-established state procedures governing their enforcement, or superimposing on them a new federal rule. Cf. Board of County Commrs. vs. United States, 308 U. S. 343." 363 U. S. 237, 241-242.

In *Commissioner vs. Stern*, 357 U. S. 39 (1958), this Court expressly required reference to state law to determine transferee liability, stating:

"* * * Since the federal courts no longer formulate a body of federal decisional law for the larger field of creditors' rights and diversity cases, any such effort for the small field of actions by the government as a creditor would be necessarily episodic. That effort is plainly not justified when there exists a flexible body of pertinent state law continuously being adapted to changing circumstances affecting all creditors. Accordingly we hold that, until Congress speaks to the contrary, the existence and extent of liability should be determined by state law." 357 U. S. 39, 45.[4]

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[4] Congress has not acted in this area, since Section 7403 of the Internal Revenue Code of 1954 (26 U. S. C. 1958 ed., Sec. 7403) merely provides a forum for the enforcement of the tax lien, and Sections 6321, 6322, and 6323 of the Internal Revenue Code of 1954 (26 U. S. C. 1958 ed., Secs. 6321, 6322, 6323) merely create the federal tax lien, the period of its existence, and its validity against certain persons. None of these statutes deals with the problems involved in this case.

Thus, in determining the applicability of the doctrine of marshaling assets, reference to state law is proper for three reasons:

1. The doctrine of marshaling assets does not involve a problem of priority, but instead assumes that this problem has been resolved;
2. The doctrine is a part of federal law and requires an examination of the equities of the parties, one of which is exemptions created by state law;
3. This Court has previously approved reference to state law in tax lien situations, even if the problem involved went beyond a determination of the taxpayer's property or rights to property.

Therefore, (1) where two funds exist, one consisting of the cash surrender value of insurance policies and the other consisting of the excess of the proceeds of these policies over the amount of the cash surrender value, (2) a bank [5] has a lien on both of these funds and the United States has a lien only on the fund consisting of the cash surrender value, (3) the bank's lien on the cash surrender value is superior and prior to that of the United States on the cash surrender value, and (4) a state statute exempts the excess fund from claims of creditors, the doctrine of marshaling assets will not be applied. Accordingly, all of the cash surrender value of the policies involved in the instant case except $441.21 was exhausted in paying the Huntington National Bank of Columbus, leaving only that amount to satisfy the lien of the United States.

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[5] A result contrary to that in Behrens, *supra*, Wintner, *supra*, and the instant case has been reached in cases where the insured borrowed from, and pledged his policies to, the insurer rather than a bank. See United States vs. Pilley, 6 AFTR 2d 5995 (D. C. W. D. Tenn. 1960); Flax vs. United States, 179 F. Supp. 408 (D. C. N. J. 1959).

CONCLUSION.

For all of the foregoing reasons, the decision of the court below is erroneous and should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1963

No. 61

ETHEL MEYER,

Petitioner,

—vs.—

UNITED STATES OF AMERICA,

Respondent.

IN OPPOSITION AND OBJECTION TO MOTION OF LILLIAN WINTNER FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

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IN THE

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Respondent.

IN OPPOSITION AND OBJECTION TO MOTION OF LILLIAN WINTNER FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

It is respectfully submitted that the motion of Lillian Wintner for leave to file brief as *amicus curiae* should be denied since there has been no showing by the movant as to any facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case.

The additional question on page 2 of the motion, which movant seeks to inject in this case, is irrelevant, immaterial and has no bearing upon the questions to be determined by this Court. On page 5 of the proposed brief of Lillian Wintner as *amicus curiae*, it is stated as follows: "The following argument proceeds on the assumption that the United States had a lien on the cash surrender value of Mr. Meyer's insurance policies during his lifetime, notwithstanding the fact that Mr. Meyer pledged the policies to a

bank as collateral security for a loan prior to the government's assessment of the income tax deficiencies." This argument is contrary to the petitioner Ethel Meyer's contentions herein and is apparently contrary to the position taken by movant Lillian Wintner before the District Court in her case (*United States* v. *Wintner*, 200 F. Supp. 157 (D. C. N. D. Ohio 1961), aff'd 312 F. 2d 749 (6th Cir. 1963)). At page 159, the District Court stated:

> "Defendant contends that the present action is barred by *res judicata*, that no lien ever arose which the Government may enforce in this action, and that, in any event, the cash surrender values of the policies were exhausted in satisfying taxpayer's debts to the bank."

The facts in the movant Lillian Wintner's case are inapposite and clearly distinguishable from the facts at bar. The facts in movant's case are very similar to those appearing in *United States* v. *Behrens*, 230 F. 2d 504 (2d Cir. 1956), cert. denied, 351 U. S. 919. In the *Behrens* case (which is fully discussed in petitioner's brief herein on the merits) as well as in movant Lillian Wintner's case an assessment of a tax lien was made first, thereby creating a lien on all the property, which was the cash surrender values of the policies. Subsequently the bank loaned the insured monies and received assignments of the policies. However, as stated by the Court in the *Wintner* case (200 F. Supp. 157, 160):

> "Since the Collector never filed the notice of assessment given Wintner on April 21, 1947, we may assume, as defendant contends, that the bank's lien was superior to that of the plaintiff."

In both the *Behrens* and the *Wintner* cases, therefore, government tax liens did attach, but they became secondary

liens, subject to the liens of the banks by reason of the non-filing of notices of assessments.

In the case at bar, under the factual situation presented herein, the government's tax liens never attached to any cash surrender value of the policies since the assignments and pledges were made prior to any tax liability or claim arising as well as prior to any assessment and notice and demand for payment.

It is respectfully submitted that the questions raised by petitioner herein before this Court, on the petition for a writ of certiorari and on the writ of certiorari are adequate and complete, and that the granting of the motion for the filing of a brief *amicus curiae* by Lillian Wintner will serve no useful purpose and should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 61

ETHEL MEYER, PETITIONER

v.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court (R. 19-20) is reported at 202 F. Supp. 606. The opinion of the court of appeals (R. 25-26) is reported at 309 F. 2d 131.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 1962 (R. 27). The petition for a writ of certiorari was filed on January 18, 1963, and was granted on March 4, 1963 (R. 28; 372 U.S. 934).

The jurisdiction of this Court rests upon 28 U.S.C. 1254.

QUESTION PRESENTED

Whether, where life insurance policies have been assigned as collateral security for a bank loan, federal tax liens on their cash surrender values, arising from an assessment subsequent to the assignment, can be satisfied out of the proceeds of the policies that remained after the loan had been paid.

STATUTES INVOLVED

Internal Revenue Code of 1939 (26 U.S.C. 1952 ed.):

> SEC. 3670. PROPERTY SUBJECT TO LIEN.
>
> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.
>
> SEC. 3671. PERIOD OF LIEN.
>
> Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

Internal Revenue Code of 1954 (26 U.S.C. 1958 ed.):

SEC. 6323. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*—Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—

* * * * *

SEC. 7403. ACTION TO ENFORCE LIEN OR TO SUBJECT PROPERTY TO PAYMENT OF TAX.

(a) *Filing.*—In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary or his delegate, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability.

* * * *

STATEMENT

Peter Meyer, petitioner's husband, owned four life insurance policies which named his wife as beneficiary. Their face amounts totaled $50,000 and their cash surrender values at his death totaled $27,285.87. Under the terms of the policies he retained the right

to change the beneficiary, demand the cash surrender value and assign the policies (R. 14-15, 19).

In 1943, prior to the tax assessments in suit, Mr. Meyer assigned the policies as collateral security for a loan from the Huntington National Bank of Columbus, Ohio. Under the terms of the assignment, if Mr. Meyer died with the loan outstanding, the bank was given the right to satisfy its claim out of the "net proceeds of the policy when it becomes a claim by death" (R. 10, 14, 15, 19).

On May 22, 1946, the Commissioner of Internal Revenue assessed a deficiency of $5,633.25 against Mr. Meyer for the year 1945. Notice and demand were made upon him on June 6, 1946. He paid $1,408.18 on April 1, 1946, and $1,408.08 on August 1, 1946, leaving a balance of $2,816.99, plus interest, remaining unpaid (R. 13-14).

On June 17 1947, the Commissioner assessed a deficiency of $3,342.10 against Mr. Meyer for the year 1946. Notice and demand were made upon him on June 18, 1947. No part of this assessment has been paid. As a result of these assessments $6,159.09, plus interest, remains due and owing.[1] A notice of lien was filed in July, 1955. (R. 14).

Mr. Meyer died on December 28, 1955. Petitioner was named executrix of his estate (R. 14, 19). Upon his death, the insurance companies paid $50,664.27, distributing to the bank $26,844.66 to satisfy the

[1] Petitioner has tendered $441.21, the difference between the cash surrender value of the policies at death and the amount then due the bank on the outstanding loan (see R. 9).

outstanding loan and the remainder to petitioner (R. 16, 18, 19).

In September, 1958, the United States commenced suit against the petitioner individually and as executrix of her husband's estate for $6,159.09, the amount of Mr. Meyer's unpaid 1945 and 1946 income taxes plus interest (R. 3-8). The district court granted the government's motion for summary judgment and held that the United States could satisfy its tax lien out of the proceeds in Mrs. Meyer's hands (R. 19-20). The court of appeals affirmed (R. 25-26). Following its earlier decision in *United States* v. *Behrens*, 230 F. 2d 504, certiorari denied, 351 U.S. 919, the court held (R. 26):

> In the present case by reason of the prior pledge of the policies to the bank the government's tax lien was secondary, but it was not nugatory, and the proceeds passed to appellant subject to both claims at the taxpayer's death. Whatever the value of the tax lien during the taxpayer's lifetime, it could be fully satisfied out of that portion of the proceeds representing the former cash surrender value by marshalling the bank's prior claim against the balance of the proceeds at his death.

SUMMARY OF ARGUMENT

In light of this Court's recent decisions, the present case presents only the narrow question whether federal tax liens which might attach to the cash surrender values of life insurance policies are defeated by a prior assignment of the policies to secure a bank loan and a preferred payment of that loan on the

death of the taxpayer which nearly exhausts the cash surrender values. Petitioner's argument is that, because of the senior pledge, the tax liens never attached, and that, in any event, the payment of the bank loan consumed the debtor's property, leaving only the excess death benefits which are immune from the government's lien. In answer, we show, first, that the tax liens, although junior, did attach to the cash surrender values of the policies during the life of the taxpayer. Further, we argue that the bank loan must be deemed to have been paid out of the excess insurance proceeds accruing at death, permitting the federal liens to be satisfied out of the cash surrender fund in the hands of the beneficiary. This result is compelled by the equitable doctrine of marshalling, which is fully applicable in this case and requires the debtor's assets to be so allocated that the two-fund creditor takes from the assets which are not available to the one-fund creditor, so that both may be satisfied.

ARGUMENT

THE FEDERAL TAX LIEN COULD BE SATISFIED OUT OF THE LIFE INSURANCE PROCEEDS IN THE HANDS OF THE TAXPAYER'S BENEFICIARY

This Court's decisions in *Commissioner* v. *Stern*, 357 U.S. 39, and *United States* v. *Bess*, 357 U.S. 51, confine this case within very narrow compass. Under the present facts, the government cannot claim against Mrs. Meyer as the "transferee" of the taxpayer, nor can the tax deficiency be asserted against any portion of the insurance proceeds except that part

which represents the cash surrender value. On the other hand, petitioner must concede (as she apparently does) that the cash surrender value of the policies was "property" of the taxpayer to which the federal tax lien could attach during his lifetime, and that the lien (if it once attached) survives with respect to that value even after the taxpayer has died and the insurance proceeds have been paid over to the beneficiary.[2] The only question open here is whether the prior pledge of the insurance policies to secure a bank loan which nearly exhausts the cash surrender value somehow defeats the federal tax lien.

That issue was first presented and decided on similar facts in *United States* v. *Behrens*, 230 F. 2d 504 (C.A. 2), certiorari denied, 351 U.S. 919. There, as here, the taxpayer died leaving unpaid federal taxes secured by a lien on the cash surrender value of his insurance policies and a bank loan secured by a prior pledge of the policies. The taxpayer had named his wife as beneficiary of the policies, but had retained the right to change the beneficiary, to borrow upon the policies and to collect the cash surrender value from the insurer. 230 F. 2d at 505. There, as here, after the insured's death the bank had a right to satisfy its claim out of the proceeds of the policies. When the insured died, the beneficiary dis-

[2] The New York Insurance Law cited by petitioner (Br. 2-4) cannot affect the attachment of the tax lien during the life of the taxpayer, or its survival in the hands of the beneficiary, as it applies to the cash surrender value of the policies. *United States* v. *Bess*, (*supra*, at 59); *Fink* v. *O'Neil*, 106 U.S. 272.

charged the pledge by paying the bank and received the entire proceeds from the insurer. The government contended that the balance in the hands of the beneficiary included the cash surrender value to which the federal tax lien had attached before the beneficiary's rights had vested. The beneficiary argued that she was entitled to deduct the amount of the prior bank loan from the cash surrender value. This claim was rejected, Judge Learned Hand writing for the court (*id.* at 507):

> The defendant also claims that in any event she was entitled to deduct the amount of the loan that Behrens had obtained from the bank, secured by a pledge of the policies. After his death she paid the loan and now seeks to be subrogated to the pledge. The tax lien, not being filed, did not indeed have priority over the pledge; but the "proceeds" were large enough to pay both claims, and it is well settled law that, when one creditor has a claim against two funds as security and another creditor has a claim against only one of them, the loan of the first will be marshalled against that fund which is security for his loan only.

The *Behrens* rule was followed by the District Court for the Northern District of Ohio in *United States* v. *Wintner*, 200 F. Supp. 157. Its decision was affirmed *per curiam* upon authority of *Behrens* by the Sixth Circuit Court of Appeals, 312 F. 2d 749, and is now pending before this Court on petition for certiorari (No. 98, this Term).[3]

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[3] A few years before the *Behrens* decision, the Fifth Circuit in *United States* v. *Gilmore*, 222 F. 2d 167, certiorari

Petitioner apparently accepts the *Behrens* decision. But she argues that the present case is not governed by it because (1) here (unlike *Behrens*) the tax *assessments* followed a bank pledge that consumed the whole of the taxpayer's property interest in his insurance policies (except $441.21), so that nothing remained to which the tax lien could attach, and (2), in any event, payment of the indebtedness to the bank, made directly by the insurers in this case (unlike *Behrens*), exhausted the cash surrender value of the policies (the only portion of the proceeds to which the tax lien could attach), with the consequence that petitioner never received any part of the liened property (except $441.21). Plainly, neither distinction is valid.

A. THE FEDERAL TAX LIEN ATTACHED TO THE CASH SURRENDER VALUE OF THE POLICIES DURING THE TAXPAYER'S LIFETIME, DESPITE A PRIOR PLEDGE OF THE POLICIES

The argument that after the policies had been pledged the taxpayer retained no interest to which the tax lien could attach is frivolous. For all practical purposes, the situation here is the same as in *Behrens*. While the tax assessments there antedated the bank pledge, the court assumed the resulting lien

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denied, 350 U.S. 843, held that insurance proceeds payable to the wife as beneficiary which were includible in the taxable estate should bear the estate tax attributable to their inclusion to make other assets of the estate available for payment of the income tax debt of the deceased insured. The effect of the decision was to hold that the United States, as a secured creditor for income taxes, came ahead of the wife's beneficial interest in the insurance.

could take effect only upon filing, which, as here, occurred after the pledge. Accordingly, in both cases, the tax lien was junior to the bank's claim, but in neither was the portion of the cash surrender value of the policies already liened exempted from the government's secondary lien. The principle is elementary that the same property is susceptible of bearing multiple liens which, in the aggregate, far exceed the value of the object. The law of security priority and ranking is founded on that premise. One lien may prime another, because it outranks the other, or because, being of equal rank, it is first in time. But the senior lien does not *destroy* the junior. Nor does it deprive the owner of his property interest, which, subject to satisfaction of prior liens, remains available to his creditors.[4] The obvious reason is that the superior lien, though originally so great as to exhaust the value of the property to which it attaches, may be satisfied by payment of the underlying debt, and the junior lien will become of value. As one would expect, the rule applies equally to the government as a junior lienor. See, *e.g.*, *United States* v. *Buffalo Savings Bank*, 371 U.S. 228; *United States* v. *Brosnan*, 363 U.S. 237, 241.

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[4] The pledge of the policies as collateral security did not divest the insured of his general property in them. *In the Matter of O'Meara*, 193 Misc. 790, 792-793, 81 N.Y.S. 2d 388, 390; *Katz* v. *Ohio Natl. Bank*, 127 Ohio 531, 533, 191 N.E. 782, 784; 2 Appleman, *Insurance Law and Practice* (1941), Sec. 1311.

B. THE FEDERAL TAX LIEN COULD BE SATISFIED OUT OF THE REMAINING INSURANCE PROCEEDS PAID TO THE BENEFICIARY, DESPITE A PRIOR PAYMENT TO THE PLEDGEE IN AN AMOUNT SUFFICIENT TO EXHAUST THE CASH SURRENDER VALUE OF THE POLICIES.

Plainly, the federal tax lien attached to the cash surrender value of the policies during the taxpayer's lifetime, despite the prior bank pledge. The remaining question, then, is whether the payment of the pledge consumed the property to which the government's lien attached, leaving only $441.21 out of which to satisfy the tax debt. Judge Hand's opinion in *Behrens*, it seems to us, settles that question. The ruling there was that the beneficiary could not defeat the federal lien by retaining the portion of the insurance proceeds exempt from the tax lien but available to the bank to pay the prior bank pledge. Is the situation different here because the insurer paid the bank directly, leaving the beneficiary no option? We think not. In the first place, nothing indicates that the portion of the proceeds paid by the company to the bank was the part representing the cash surrender of the policies.[5] From the insurer's point of view, there existed only one fund, *all* of which was incumbered by the pledge.[5] It paid the bank the

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[5] The government alleged (R. 15) and the district court expressly found (R. 19) that "the bank was given the right to satisfy its claim out of the net proceeds of the policy when it became a claim by death," and petitioner has never disputed the fact (see R. 16, 18-19). Section 166 of the Insurance Law of New York does not affect the right of a *conventional assignee* to collect the portion of the proceeds not attributable to the cash surrender value of the policy; it merely limits the right of "creditors" to attach the proceeds

amount of the outstanding debt, without purporting to say whether the sum involved should be attributed to cash value or death benefit. But, were it otherwise, it seems plain the insurer could no more defeat the federal lien by a fictitious allocation than could the beneficiary. See, Lawrence, *Equity Jurisprudence* (1929), Sec. 806; *Sehon-Stevenson & Co.* v. *Union Trust Co.*, 113 F. 2d 968 (C.A. 4). The critical fact is that the bank's lien attached to both funds—the cash surrender value fund and the death benefit fund—while the tax lien attached only to the first. Under those circumstances, the controlling principle is that allocation must be made in such a way as to satisfy (so far as possible) both creditors: there can be no juggling to defeat the creditor whose claim is restricted to a single fund.*

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in satisfaction of their claims against the assured. See Petitioner's Brief, pp. 2-4.

See *Katz* v. *Ohio Natl. Bank*, 127 Ohio at 533, 191 N.E. 784; Schwarzschild, *Rights of Creditors in Life Insurance Policies* (1963), p. 114; *The Assignment of Life Insurance as Collateral Security*, 58 Yale L. J. 743, note 5 (1949); and see Revised Comments on Form No. 10—Assignment of Life Insurance Policy as Collateral (Bank Management Commission, American Bankers Association) (1949), p. 16.

* See *Lanoy* v. *Athol*, 2 Atk. 444, 446; *Aldrich* v. *Cooper*, 8 Ves. Jr. 382, 384-385; *Cheesbrough* v. *Millard*, 1 Johns. Ch. (N.Y.) 409, 412; III Blackstone's *Commentaries*, p. 426, note 6th; Maitland, *Equity, Lecture XVII, Administration of Assets (II)* (Brunyate Rev., 1936), p. 266; 2 Story's *Equity Jurisprudence* (14th ed., 1918), Secs. 758, 760, 853-871; 2 Pomeroy's *Equity Jurisprudence* (5th ed., 1941), Secs. 396, 410; 4 Pomeroy's *Equity Jurisprudence* (5th ed., 1941), Sec. 1414; 2 Lawrence, *Equity Jurisprudence* (1929), Secs. 803-824; Keeton, *An Introduction to Equity* (4th ed., 1956), pp.

It is no argument against marshalling that it enables the government to secure indirectly the benefit of the excess proceeds realized upon the death of the delinquent taxpayer, not otherwise directly available to it. Marshalling, by its very nature, always gives the one-fund creditor the indirect benefit of the second fund directly enjoyed by the senior lienor alone. See Langdell, *A Brief Survey of Equity Jurisdiction* (2d ed., 1908), pp. 15-16. The application of marshalling to the double-liened insurance proceeds does not enlarge the government's right, but rather limits the beneficiary—as equity requires—to the unincumbered interest.

In the end, we return to the logic of the *Behrens* rule. The crucial question, between the government and the beneficiary, is by what right the latter can compel the bank to satisfy its loan out of the cash surrender value rather than the excess proceeds. She cannot do so in her own right, since her interest was wholly contingent at the time the tax lien arose and did not vest until the taxpayer's death. It is at this point that the *amicus*' objection (pp. 6-8) to the application of the principle underlying marshalling founders. This is not a case in which creditors are competing with a debtor whose property is protected by public policy. Rather, it is a case in which an unsecured claimant is competing with two secured claimants with respect to property over which their debtor had complete control. See *Chase Nat. Bank*

33, 41, 133-136; Sheldon, *Subrogation* (2d ed., 1893), Secs. 61-70; and see *Sir William Harbert's Case*, 3 Coke 11, 12b, 14b.

v. *United States*, 278 U.S. 327. The only way in which the beneficiary can assert a superior right to the cash surrender value is on the theory advanced by the beneficiary in *Behrens*, *i.e.*, that, having paid the bank loan, she is entitled to be subrogated to the bank's superior right to the cash surrender value. But, as between the United States and the bank, the rule of marshalling is plainly applicable.[7] The result merely reflects the fact that petitioner's interest, derived from the common debtor, is subordinate to the payment of his debts secured by prior liens against the insurance proceeds.

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[7] This Court has considered the marshalling rule in several other instances: *Fenwick* v. *Chapman*, 9 Pet. 461, 474; *Savings Bank* v. *Creswell*, 100 U.S. 630, 641; *Scruggs* v. *Memphis & Charleston R. R. Co.*, 108 U.S. 368, 378; *Merrill* v. *National Bank of Jacksonville*, 173 U.S. 131, 138; *Sowell* v. *Federal Reserve Bank*, 268 U.S. 449, 456-457; see *Lidderdale* v. *Robinson*, 12 Wheat. 594, 596.

It may be noted that where the collection of taxes is not prejudiced, a federal tax debt has been held to be subject to marshalling. Thus, a creditor having a lien on only one asset may compel the United States to exhaust other immediately available assets to which the tax lien applies. *First Nat. Bank of Boston* v. *Proctor*, 40 F. 2d 841 (C.A. 1); *In re Ann Arbor Brewing Co.*, 110 F. Supp. 111 (E.D. Mich.); *United States* v. *Lord*, 155 F. Supp. 105 (D. N.H.). Here, if there were other assets in the debtor's estate, the insurance beneficiary could, as against distributees and general creditors of the estate, be subrogated to the claims of creditors of the estate, or the United States, having liens on the insurance. See *Barbin* v. *Moore*, 85 N.H. 362, 366, 159 A. 409, 83 A.L.R. 62.

CONCLUSION

The judgment below is correct. It should be affirmed.

Respectfully submitted,

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